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Part II

Environmental Protection Agency

40 CFR Part 51 et al.

Operating Permits Program and Federal Operating Permits Program; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 70, and 71

[FRL–5285–9]

RIN 2060–AF70

Operating Permits Program and Federal Operating Permits Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is today proposing new streamlined procedures for revising stationary source operating permits issued by State and local permitting authorities or EPA under title V of the Clean Air Act (Act). This proposal is a supplement to actions published in the **Federal Register** on August 29, 1994 and on April 27, 1995 as they relate to permit revisions. In addition, today's action proposes changes to the certification that responsible officials of permitted sources are required to submit and the emergency defense available for violations of permit terms. It also clarifies the application of title I and title V permitting requirements to non-major research and development (R&D) facilities that are located with sources that are major under the Act. Finally, it proposes to revise the procedural requirements applicable to minor new source review (NSR) permitting under title I of the Act to clarify the flexibility States possess in providing adequate process for minor NSR actions.

Several concerns over complexity and burden of the previously proposed permit revision system were raised in response to these actions. As a result, the Agency today is proposing to establish a system for revising operating permits that is simpler, more flexible, and easier to implement than that proposed in the prior notices.

Implementation of today's proposal would benefit the environment primarily through enhanced implementation of, and compliance with, air quality control requirements. The extent of benefit would be nationwide and could potentially include all requirements of the Act applicable to part 70 sources.

DATES: Comments on the proposed regulatory changes must be received by October 30, 1995. Comments on the revised Information Collection Request (ICR) for the revised part 70 must be received by October 30, 1995.

ADDRESSES: Comments on the proposed revisions to 40 CFR part 70 must be mailed (in duplicate if possible) to: EPA Air Docket (LE–131), Attn: Docket No. A–93–50, room M–1500, Waterside Mall, 401 M Street SW, Washington, DC 20460. Comments regarding the 40 CFR part 71 Federal operating permits program must be mailed to the same address, Attn: Docket No. A–93–51. Please identify comments as pertaining to today's proposal by date and FR cite. Comments on the draft ICR for the revised part 70 are to be submitted as per instructions in Section VI. E., *Paperwork Reduction Act,* of this preamble.

Docket: Supporting information used in developing the proposed regulatory revisions to part 70 and part 71 are contained in Docket Nos. A–93–50 and A–93–51 respectively, at the preceding address. This docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Regarding proposed revisions to parts 51 and 70, Michael Trutna (919/541–5345), Ray Vogel (919/541–3153), or Roger Powell (919/541–5331), mail drop 12, United States Environmental Protection Agency, Office of Air Quality Planning and Standards, Information Transfer and Program Integration Division, Research Triangle Park, North Carolina 27711. Regarding proposed revisions to part 71, Candace Carraway (919/541–3189) or Kirt Cox (919/541–5399) at the same address.

SUPPLEMENTARY INFORMATION: Today's proposal reflects the principles articulated in the President's and the Vice President's March 16, 1995 report, ''Reinventing Environmental Regulation.'' That report establishes as goals for environmental regulation building partnerships between EPA and State and local agencies, minimizing costs, providing flexibility in implementing programs, tailoring solutions to the problem, and shifting responsibilities to State and local agencies. The Agency believes that today's proposal meets the goals of the report.

Public Comments

If possible, comments should be sent in both paper and computerized form. Two paper copies of each set of comments are requested. Comments generated on computer should also be sent on an IBM-compatible, 3½-inch diskette and clearly labeled. Please identify comments as pertaining to today's proposal by date and FR cite.

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The contents of today's preamble are in the following format:

I. Background

A. Operating Permits Regulations

Title V requires that EPA develop regulations which set minimum standards for State operating permits programs. Those regulations, codified in part 70 of chapter I of title 40 of the Code of Federal Regulations, were originally promulgated on July 21, 1992 (57 FR 32250). On August 29, 1994, EPA proposed a number of revisions to the part 70 regulations as a result of negotiations with litigants who petitioned for review of part 70 after its promulgation. The August 1994 proposal included new provisions governing permit revision processes. Today's proposal supplements that part of the August 1994 proposal and defines a simpler approach to revising permits designed to build upon existing State permitting programs.

Title V also requires that States submit their operating permit programs for EPA approval and that EPA promulgate and administer a Federal operating permits program for States that have not obtained EPA approval by November 15, 1995. The EPA's proposed regulations, to be codified at part 71, for the Federal operating permits program were published on April 27, 1995 (60 FR 20804). In large part the proposed regulations were modeled on the original part 70. However, the permit revision procedures for proposed part 71 were based on the August 1994 proposal for part 70 permit revisions. Today EPA is proposing an alternative permit revision process for part 71 that is based on today's proposal for part 70 permit revision procedures.

B. Proposed Permit Revision System

The August 1994 notice proposed to revise § 70.7 of part 70 to set out a four-track system for revising operating permits. Comments received at the October 19, 1994 public hearing and comments submitted to the docket indicate that the proposed four-track system was widely perceived as too complicated, prescriptive, and disruptive to existing State programs. In response to those concerns, EPA sought further input from representatives of State and local permitting agencies, industry, and environmental groups to learn more directly of their implementation concerns. The EPA received thoughtful ideas from these groups about how the process for permit revisions might be accomplished in a more streamlined fashion. The docket for today's action contains some specific alternative permit revision approaches recommended by these commenters.

Representatives of the various groups were in general agreement on a number of issues. First, any permit revision system would need to be far simpler to implement than that laid out in the August 1994 proposal. Second, it should be as streamlined and expeditious as possible so as not to impede unduly a source's ability to respond to changes in market conditions. Third, it should provide public process commensurate with the environmental significance of the change. Fourth, for changes subject to a State preconstruction review program established pursuant to the Act (e.g., NSR), public, affected State, and EPA review of the more environmentally significant changes should occur during the underlying process, instead of a subsequent part 70 permit revision process. Finally, the process should maximize State and local agency flexibility.

As discussed in Section II of this preamble, today's alternative proposal satisfies all of these criteria by building on underlying State review programs. After considering comments received on today's proposal, EPA intends to promulgate final rules regarding permit revisions along with the other issues addressed in the August 1994 and April 1995 proposals.

C. Other Proposed Revisions in Today's Notice

Today's notice also proposes additional rule revisions to address other issues raised by litigants in their petitions for review of part 70. These issues involve the current rule's provisions regarding responsible official certifications, the emergency defense for violations of some types of permit terms, section 302(j) rulemaking regarding inclusion of fugitive emissions in the definition of major source, and the definition of title I modification. It also proposes to clarify the public review requirements of title I and title V applicable to minor NSR permits and their subsequent incorporation into part 70 permits. The EPA currently expects to complete rulemaking on these issues at the same time it takes final action on the other issues addressed in the August 1994 proposal. Proposed actions regarding responsible official certifications, the emergency defense, and the definitions of major source and title I modification are also included in today's notice with respect to the part 71 Federal operating permits program provisions.

Finally, in today's notice EPA is clarifying that non-major R&D activities located with a source that is major under sections 112 or 302(j) of the Act or parts C or D of title I of the Act need *not* be considered part of that major source. Depending on the extent to which a non-major R&D facility contributes to the activity of the major source, the R&D facility need not be subject to permitting under title I or title V.

A number of revisions to the definitions in § 70.2 are included in today's notice to be consistent with the proposed revisions. Other definitions are proposed to be added where needed for clarity.

D. Environmental Benefits

The operating permits program provides a uniform vehicle for State and local agencies to administer other titles of the Act; not only the requirements for attainment and maintenance of the national ambient air quality standards (NAAQS) but of other provisions such as those to protect the public from harmful effects of HAPs. It is through an efficient permit program that many of the environmental benefits of these programs are realized.

Part 70 helps achieve these benefits by giving company officials the opportunity to be fully knowledgeable about their compliance obligations and creates strong incentives for assuring that compliance is maintained. This will in turn result in improved air quality for the public, and States will not have to adopt new regulations to meet air quality standards to make up for noncompliance with existing rules. In the process of developing permit applications for part 70 programs, companies have discovered new uncontrolled emission points or air pollution requirements that applied to them but of which they were not previously aware. As a result, these facilities are taking steps to comply with those requirements. The vast majority of businesses in this country want to comply with environmental regulations. The part 70 program clarifies their obligations while avoiding possibly costly litigation.

Implementation of today's proposal will facilitate accomplishing the described environmental benefits. The proposed revisions would focus public and EPA review on, and ensure that resources will be targeted to reviewing, changes with the most environmentally significant impacts. In addition, the proposed streamlined permit revision system assures that permits are speedily revised to include all Act obligations for a source while avoiding unnecessary procedural delays and opportunity costs. This will assure certainty of compliance obligations for all parties.

Implementation of today's proposal also will help achieve environmental benefits through its requirements for flexible permits. In particular, the flexible permit provisions of today's proposal would allow more options for sources in designing their title V permits to meet environmental obligations. This increased flexibility would allow sources to rely on emissions trading to meet pollution control requirements and to use pollution prevention approaches which can achieve additional emissions reductions.

E. August 1994 Proposed Revisions

The August 1994 proposal is not being withdrawn, but is instead being supplemented by today's proposal. Today's proposal primarily addresses provisions in § 70.7 for revising permits, which was also the primary focus of the August 1994 notice. There were, however, many proposed revisions to

part 70 in the August 1994 notice that addressed other portions of part 70. These proposed changes, which are described in the next several paragraphs, are still being considered for promulgation after review of comments. The period of comment has closed for the August 1994 notice; however, EPA will consider additional comments on any of the August 1994 proposed provisions to the extent they would be affected by the proposed revisions in today's notice.

In § 70.2, revisions were proposed in the August 1994 notice for the definitions of ''Applicable requirement,'' ''Major source,'' ''Potential to emit,'' and ''Responsible official.'' The notice proposed new definitions for ''Major NSR'' and ''Minor NSR'' and proposed to delete the definition of ''Section 502(b)(10) changes.'' Proposed revisions to § 70.3 would exempt sources from part 70 applicability if they were subject solely because of being major for a section 112(r)-only pollutant and would add to the list of sources subject to part 70 those sources subject to parts C and D of the Act.

Proposed revisions to § 70.4 included consolidating provisions for program modification in paragraph (i)(1), changing the maximum period for judicial review from 90 days to 125 days, changing the time period for acting on early reductions permits from 9 to 12 months, revising the interim approval criteria for part 70 programs, and adding a provision that EPA can continue to issue phase II acid rain permits.

For § 70.5, the August 1994 proposal included provisions for deleting the 12-month deferral for permit application submittals except for new major sources, provisions for flexibility in submitting acid rain permit applications, clarification of the information needed for a permit application to be deemed complete, clarification that emissions may not be discounted when determining major source status, and addition of the requirement for applications to identify units eligible for emissions trading.

Section 70.6 was proposed to be revised to add provisions for defining ''prompt'' with respect to reporting deviations from the permit and for defining ''upset conditions'' and to require weekly reporting if the source switched to a new alternative scenario unless the type of monitoring indicated the switch.

Changes proposed to § 70.7 other than for permit revisions included provisions for accommodating changes that occur during permit issuance, changing the time period for acting on early reductions permits from 9 months to 12 months, and adding a provision for notifying the public of sources covered under general permits.

Section 70.8 was proposed to be revised to include a provision that the public would be notified of the end of EPA's 45-day review period. A clarification was proposed for § 70.9 that periodic updates of the permit fee demonstration were necessary as required by EPA. Section 70.10 was proposed to be revised to specify the application of sanctions for failure to submit a program or obtain program approval and operation of a Federal program. Finally, § 70.11 was proposed to be revised to allow mental state to be considered for penalties assessed above $10,000.

II. Alternative Proposal for Part 70 Permit Revision System

A. Overview

Pursuant to the Act, States have adopted programs for reviewing and potentially regulating the air quality impacts of constructing or modifying sources of air pollution (e.g., NSR). States will also adopt programs for reviewing changes to sources of toxic air emissions prior to their operation under certain circumstances. (For the sake of brevity, these programs will be generally referred to as ''State review programs.'' [1])

Today's proposal for revising part 70 permits builds on these State review programs by providing for automatic incorporation into part 70 permits of all changes subject to those programs. It makes use of the procedural requirements already applicable to those programs to provide adequate public review of the part 70 permit revisions occasioned by those changes. For the more environmentally significant changes reviewed by State programs, the public, affected States, and EPA would have a 30-day review opportunity during the State review process. For all other changes subject to a State review program, States would have broad discretion to use procedures that are commensurate with the environmental significance of the change. De minimis changes (as defined by the State and approved by EPA in the State's part 70 program) could be processed without public, affected State, or EPA review. Further, changes subject to an applicable requirement that do not conflict with existing permit terms could generally be made immediately upon notice of the change by the source.

Since most State preconstruction review programs govern nearly all source changes requiring a part 70 permit revision, EPA expects the vast majority of changes would qualify for this automatic incorporation process. However, for changes that are not subject to a State review program, the proposal would provide for a separate part 70 process. The more significant changes of this type would get public process consistent with the procedures required for initial permit issuance. For other changes, States would have discretion to devise procedures that match the amount and timing of public process to the environmental significance of the change. Changes that a State defines and EPA approves as de minimis could be processed without public, affected State, or EPA review. Indeed, certain changes that render a source subject to a newly applicable requirement could be incorporated into the part 70 permit by means of a notice submitted by the permittee, so long as the change did not conflict with existing permit terms and no source-specific determinations need be made in applying the requirement to the source. States would have to provide for periodic notification to the public of all part 70 permit revisions and for public access to decisions.

The Agency's opportunity to object to a permit revision would generally be limited to the relatively small group of more environmentally significant changes. Even for these changes, EPA would be required to object before the State took final action on the proposed change for all defects that are reasonably apparent at that time. For de minimis changes, EPA would waive its opportunity to object until permit renewal. For all other less environmentally significant changes, EPA would waive its opportunity to object for a 5-year period after approval of a program except in response to a citizen's meritorious petition where the error in the permit revision would have a significant adverse environmental effect. During this 5-year period, EPA would audit State program implementation to ascertain whether its waiver of its review should be suspended or extended for one or more States.

[1] By using the term ''State review programs,'' however, EPA does not mean to imply that such programs necessarily subject all changes governed by the program to prior permitting authority review and approval. As discussed later in this notice, at least several existing State review programs do not require such review for some categories of changes but instead subject those changes to general rules or permits. To make this type of change for purposes of the State review program, a source need not obtain affirmative permitting authority review and approval but need only comply with the applicable requirement set forth in the general rule or permit.

The fundamental premise of this proposal is that the section 502(b)(6) requirement for adequate, streamlined, and reasonable permit revision procedures is best met by building on State review programs established pursuant to the Act. The Federal regulations governing these underlying State programs address most of the procedural requirements of title V. For example, Federal NSR regulations generally address the need for, and extent of, opportunities for public participation in NSR permitting (§§ 51.160–161). (The EPA is also proposing revisions to its NSR regulations to clarify the extent of States' discretion in providing public process for minor NSR permit actions.) Section 502(b)(6) does not require more public process than the regulations governing these programs require. To the extent a State program meets the requirements of applicable Federal regulations, the public procedures afforded by the State program are sufficient for title V purposes as well.

In those few instances where the applicable Federal regulations or the State programs themselves do not address title V requirements (such as those in § 70.6 requiring sufficient permit conditions to assure compliance with all applicable requirements), States would have to augment either their underlying program or their part 70 program so as to avoid the need for a part 70 revision process subsequent to the State review process. By building on State review programs in this way, title V permit revision procedures would be more streamlined than those afforded by the current part 70 rule and at the same time provide public review of the more significant changes *prior* to the change being made, when public comments can have the most effect. Only where a change is not subject to a State review program would the proposal call for a separate title V process to be provided.

Another central tenet of today's proposal is that EPA should not prescribe for State part 70 programs detailed revision procedures for all or even most potential source changes. As a result of States' differing circumstances, State air programs vary widely in scope and the type and stringency of controls they impose. The diversity of State requirements is not susceptible to precise or simple categorization, so nationally prescribed procedures run the risk of being complicated and/or ill-suited to at least some types of changes. The Agency therefore believes that States should be afforded broad discretion to determine permit revision procedures, including the amount and timing of public review, for all but the most significant changes.

While today's proposal does specify minimum requirements for permit revision procedures, it also provides that States may obtain part 70 program approval by adopting substantially equivalent alternative procedures. States would thus have additional flexibility to craft procedures that vary somewhat from the specified minima but that achieve substantially equivalent results.

B. When Is a Permit Revision Required

As a starting point, it is necessary to know when a permit revision is needed. In the August 1994 notice, EPA proposed to amend the regulations to make clear that permit revisions are needed for changes that (1) cannot be operated without violating the existing part 70 permit or (2) render the source newly subject to an applicable requirement. Today's proposal maintains that approach to defining when a permit revision is needed.

The Agency would like to reiterate that the applicable requirements resulting from minor or major NSR are the terms and conditions of an NSR permit. Simply triggering NSR at a source with an existing part 70 permit does not in and of itself require a part 70 permit revision. A part 70 permit revision would be necessary only to add any new or different NSR permit terms that result from the review and any additional provisions to assure compliance with them.

Even changes that would result in application of a minor NSR or other requirement might not require a permit revision to the extent the permit has been crafted to accommodate the change. For example, a State may create an ''advance'' NSR provision or include a minor NSR standard exemption in a source's part 70 permit. Both of these provisions would define the minor NSR requirement applicable to a particular change or changes such that the source could undertake the changes without an approval process, provided that the terms of the advance NSR provisions were met. In essence, the change would already be authorized by the permit as long as it met the requirements (including any necessary conditions) already in the permit. A change meeting these conditions, therefore, would not trigger a part 70 permit revision unless the change contravened a permit term or triggered some other applicable requirement not provided for in the permit.

As another example, if a source installs a piece of equipment that is subject to a reasonably available control technology (RACT) requirement, the installation would not require a permit revision if the RACT requirement was already adequately described in the permit. A permit revision would be needed only if the installation would contravene the permit or trigger some other applicable requirement not addressed by the permit. The source would, however, likely need to provide notice to the permitting authority describing the equipment being installed and the applicable requirement to which it is subject.

The August 1994 notice proposed to narrow, but not eliminate, the current rule's ''off-permit'' provisions. Under those provisions, a change that a source can operate without violating its permit but that renders the source newly subject to an applicable requirement may be incorporated into the part 70 permit after the change is operated, if the State's program provides the off-permit mechanism. Today's proposal, however, would require a permit revision by the time the change is operated. Since under today's proposal all changes that undergo a State review program would be immediately incorporated into the part 70 permit on completion of that review, the need for the off-permit mechanism would be substantially reduced. For changes that do not undergo such review but are subject to applicable requirements the terms of which do not vary from source to source, today's proposal would allow the source to revise the permit, and thus operate the change, upon notifying the permitting authority, provided the change can be operated without violating any existing permit terms. (See Section II. D. of this preamble, *Incorporation of Changes Not Subject to State Review Programs.)* Today's proposed approach would thus ensure that the part 70 permit is a contemporaneous and comprehensive summary of all applicable Act requirements, an approach most consistent with the statutory purposes of title V and favored by many State permitting authorities. Consequently, EPA is proposing to eliminate the off-permit provision of the current rule if it adopts today's proposed permit revision system.

At the same time, the Agency is interested in receiving comment on whether changes that are expressly exempted from minor NSR but are nevertheless subject to an applicable requirement such as new source performance standards (NSPS) or RACT should be allowed to remain off-permit until permit renewal. As explained elsewhere in today's notice, EPA is proposing a streamlined means of incorporating such requirements into

permits that would maintain the comprehensiveness of the permit. The Agency solicits comment on whether its proposed revision procedures appropriately balance the need for source flexibility and a comprehensive permit with regard to these changes or whether these changes should only be incorporated into the permit at permit renewal.

It is worth pointing out that today's notice also supplements the August 1994 notice's proposed revisions of the part 70 regulations implementing section 502(b)(10) of the Act. Under the August 1994 proposal, part 70 would implement section 502(b)(10) by providing for the establishment of emissions caps in part 70 permits and for emissions trading under such caps. Today's notice provides a further explanation in §§ 70.2 and 70.4 of the utility of emissions caps and how such caps may be implemented. It further proposes regulatory changes to codify relevant definitions and program elements.

C. Automatic Incorporation for Changes Subject to State Review Programs

1. Scope

As indicated above, today's proposal would establish two basic categories of changes for permit revision purposes. The first category would include all changes that are subject to State review programs established pursuant to the Act. These changes would be automatically incorporated into a part 70 permit upon completion of that review or, where the State review program does not require prior permitting authority review and approval, upon submission by the source of a notice describing the change and identifying the requirement applicable to the change. The second category would include all other changes that require a permit revision, and States would have broad discretion to design a part 70 permit review process for these changes.

Under today's proposal, the first category of changes would include all changes that are subject to major or minor NSR or regulations implementing section 112(g) and changes that entail a source-specific revision of the State's implementation plan (SIP). The process afforded by these State review programs would (1) have to include an adequate opportunity for public participation and affected State and EPA review, and (2) have to define revisions needed to the part 70 permit as a result of the change.

Under some State minor NSR programs, not all changes subject to minor NSR requirements get case-by-case permitting authority review and approval. Instead, some types of changes are subject to general rules, and the source may make such a change without prior permitting authority approval so long as it complies with the applicable requirements. These changes would be included in the first category even though they individually do not receive affirmative permitting authority review and approval. In the case of such changes, the State has determined that particular categories of changes do not require case-by-case review and may be adequately controlled by application of general requirements. (Changes subject to general rules are typically changes that occur frequently enough and are defined and understood well enough that a generic approach to their control is both efficient and effective.) Presumably there would also be no need for permitting authority review upon incorporation of the change into the part 70 permit, unless the change would require revision of an existing part 70 permit term. The Agency thus believes that part 70 permits may be revised to reflect such changes by means of a notice submitted by the source describing the change and the Act requirements newly applicable to the source as a result of the change, provided the change can be made without violating an existing part 70 permit term. As explained further below, a permit revision made in this way (i.e., without prior permitting authority review and approval) would not shield a source against enforcement action for failing to comply with the requirements actually applicable to change.

As also described in more detail below, what constitutes an adequate opportunity for public participation and affected State and EPA review would vary with the environmental significance of the change. Briefly, for the more environmentally significant changes, the full process required by the Federal regulations applicable to the State review program would be required. For instance, for changes subject to major NSR, a 30-day prior public comment period would be required (§§ 51.160–166). For less environmentally significant changes, States would have discretion to vary the amount and timing of public process provided with the environmental significance of the change. The State could exempt those de minimis categories of changes subject to minor NSR from prior public, affected State, and EPA review altogether based on its determination approved by EPA that subjecting such changes to review would yield a gain of trivial or no value (*Alabama Power Co.* v. *Costle,* 626 F. 2d 323 (D.C.Cir. 1979).[2] As EPA is making clear in today's proposed revisions to the regulations governing NSR, States already have discretion to provide public review for minor NSR actions commensurate with the environmental impact of the change, including exempting de minimis changes from public process entirely.

Process aside, part 70 includes permit content requirements not all of which are necessarily addressed by current State programs. To gain part 70 program approval, States would have to impose these requirements pursuant to State regulations governing either the underlying program(s) or the part 70 program.

Changes subject to a State review program may affect a part 70 permit limit not governed by the review program or render a source subject to Act requirements in addition to those imposed by the review program itself. For example, a change subject to minor NSR may also render the source subject to a maximum achievable control technology (MACT) standard. For such ''combination changes'' the question arises as to what revision process applies. With the exception of establishing new monitoring approaches, the general rule would be that a combination change (i.e., a change that renders a source subject to two or more applicable requirements, not all of which are imposed pursuant to a State review program) can be processed together using the automatic incorporation process, provided the change receives public or EPA review in the State process as appropriate for the different applicable requirements triggered. For example, where an emissions increase is subject to minor NSR and section 112(j) of the Act, the change could be processed using the State's minor NSR program, but the process provided would have to meet the procedural requirements applicable to section 112(j) determinations. As explained in Section II. D. of this preamble regarding changes not reviewed under a State review program, section 112(j) determinations would be included in the category of more environmentally significant changes and would thus be subject to a required 30-

[2] Use of the term ''de minimis'' should not be confused with use of that term in the August 1994 notice proposing a permit revision system that included a track entitled ''de minimis permit revisions.'' Today's proposal would replace the permit revision system proposed in the August 1994 notice and use the term ''de minimis'' only to describe changes at sources that meet the de minimis criteria set forth in the *Alabama Power* case.

day opportunity for prior public, affected State, and EPA review.

Under today's proposal, a change would be included in the first category of changes and be automatically incorporated into a part 70 permit if it is subject to a State review program. Several groups have suggested that RACT and MACT requirements that do not entail source-specific determinations be eligible for automatic incorporation even if the change triggering the RACT or MACT requirement is *not* subject to a State review program. The EPA agrees with the basic premise of this suggestion that incorporation of such requirements into part 70 permits warrants little or no review, provided they do not conflict with any existing part 70 permit term. Where RACT and MACT are so specifically defined that little or no judgement need be exercised in applying the requirement to the source, there is little to be gained from reviewing the source's judgement that the requirement applies. Instead, it should be enough for the source to submit a notice to the permitting authority upon making the change stating that the source is consequently subject to the MACT or RACT requirement and that the notice is attached to the source's permit. Under such a process, the source would not be shielded from enforcement action if it were mistaken as to the scope or nature of the Act requirements applicable to the change.

The EPA is proposing that such requirements, when triggered by a change that is *not* subject to a State review program, be included in the second category of changes but nevertheless get the benefit of an automatic incorporation process (see Section II. D. of this preamble). Eligible requirements would be those that do not require interpretation as to applicability and do not require creation of source-specific permit terms or conditions. The justification for automatic incorporation of these types of requirements is that their application is so straightforward that little is to be gained from additional process.

The EPA is proposing to place these requirements in the second category. However, the Agency is not now in a position to say that no RACT or MACT requirement warrants additional process or to catalog which requirements warrant additional process and which do not. While most RACT requirements and some MACT requirements now appear candidates for automatic incorporation, a determination would have to be made for specific requirements whether further process is warranted. In the case of MACT, EPA could make that determination when it issues new MACT standards, and as the Agency indicated in the August 1994 proposal, MACT compliance schedules could be automatically incorporated into a permit. As for RACT and other SIP requirements, States are in the best position to judge whether specific requirements are appropriate for automatic incorporation. States could make such judgments for SIP-based requirements and provide for automatic incorporation of those it deemed appropriate, as well as for those MACT requirements that EPA has determined are eligible for automatic incorporation.

To the extent they must be incorporated into part 70 permits at all, title VI requirements (relating to stratospheric ozone protection) may also be candidates for automatic incorporation where they entail few if any source-specific determinations. The Agency solicits comment on what title VI requirements would be appropriately processed in this way.

2. Automatic Incorporation Process

For changes that are reviewed by a State review program, the permitting authority would automatically incorporate the change into the part 70 permit immediately on completion of the review. The permitting authority could accomplish this by simply attaching the results of the review to the part 70 permit. The source could operate the change upon completion of the review process. For changes regulated by a State review program through a general rule, the source would submit a notice describing the change and the applicable requirements that attach as a result of the change. As part of the notice, the source would have to certify that it could operate the change without violating any existing permit terms and supply any additional permit terms required by part 70 (i.e., periodic reporting requirements). The source could operate the change upon submitting the notice.

Preconstruction permits in many cases impose new applicable requirements or alter existing ones. These new or altered requirements and other terms and conditions of the new preconstruction permit would be applicable requirements for incorporation into the part 70 permit. Any existing terms and conditions of the part 70 permit that no longer applied or were revised as a result of the preconstruction permitting action would need to be either replaced by the new terms and conditions, declared no longer applicable, or revised as part of the permit issued pursuant to preconstruction review. The permitting authority would then attach this permit upon issuance to the part 70 permit.

Under the proposed system, it would be important for the permitting authority to identify during the preconstruction review process which terms of the existing part 70 permit would be changed or eliminated because they would no longer be relevant. For instance, during consideration of a minor NSR permit for a replacement emissions unit, the public notice would need to include information about any part 70 permit terms affected by the change. The permitting authority would also have to specify in the final NSR action which terms and conditions of the operating permit were being revised by the automatic incorporation process. One way for the permitting authority to do this would be to prepare an attachment to the permit identifying which terms of the part 70 permit were replaced or revised.

The mechanism for automatically incorporating a change would also have to ensure that the part 70 permit content requirements of §§ 70.6(a) and (c) of the current rule are addressed. Many of these requirements could be included in the original part 70 permit as boilerplate conditions, so as to cover any subsequent permit revisions. Requirements relating to reporting, annual certification, and inspection and entry should translate well to boilerplate conditions. Since new requirements established in a prior review could be attached to the part 70 permit, the original part 70 permit would have to ensure that the boilerplate conditions applied to any new requirements attached to the permit as well. On the other hand, some requirements are often created or revised on a unit-by-unit basis. In such cases, these requirements would have to be explicitly addressed by the State pursuant to its review program. The permitting authority would also have to approve as part of that review the adequacy of any associated changes to previously approved conditions.

Under a unitary permit program permitting authorities need not attach new or different applicable requirements to the permit, provided the unitary permit has already incorporated them and contains sufficient terms or conditions to assure compliance with any new or different applicable requirements consistent with § 70.6. For purposes of part 70, a unitary permit means a single permit which contains all terms and conditions needed to meet the requirements of part 70 and the requirements of major or

minor NSR or actions requiring review under regulations implementing section 112(g) of the Act.

3. Criteria for State Review Programs

Background. As noted earlier, State review programs are generally governed by Federal regulations. These regulations address procedural requirements, including the provision of an opportunity for public participation. In the case of major NSR, EPA believes that all State programs meet the applicable Federal procedural requirements, which call for prior public notice and a 30-day public comment period. Regulations governing section 112(g) are not yet final, but States will presumably establish programs that comply with the requirements of those regulations.

Under the applicable Federal regulations, States have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards. Indeed, States may exempt categories of changes from minor NSR altogether on de minimis grounds (i.e., the change is trivial in size and of no importance in safeguarding ambient standards). States have exercised this discretion to subject some or many, but generally not all, minor source changes to their minor NSR programs. The EPA does not intend to revisit the scope of State minor NSR programs as part of the review process for approving State part 70 programs.

Just as States may exclude some categories of sources or changes from minor NSR, they have also exempted at least some from public procedures. The EPA recognizes that States may also structure their minor NSR program to limit the public process afforded during preconstruction review consistent with the environmental significance of the change. Elsewhere in today's notice, EPA is proposing to revise the Federal regulations governing minor NSR at § 51.161 to clarify the scope of State discretion in affording public process for minor NSR actions.

As discussed in the August 1994 preamble (59 FR 44478–79), the circumstances surrounding some of the exemptions from public process in minor NSR programs may have changed since they were adopted and thus the basis for these exemptions warrant review. The EPA, however, believes that the majority of State minor NSR programs generally afford adequate public process for the less environmentally significant changes, as EPA is proposing to define them in today's notice, for both title I and title V purposes. Indeed, EPA is proposing to revise § 51.161 to make clear the considerable flexibility States have to fashion public participation requirements to the environmental significance of changes subject to minor NSR. The Agency also believes that States are in the best position to make an initial assessment of the continuing adequacy of their procedures. As further explained subsequently in this preamble, if a State's procedures should be found in need of some changes, the changes could be accomplished through revisions of either the State's minor NSR program or its part 70 program. States would thus have flexibility to make changes in the context they found most appropriate.

Beyond public process requirements, State programs do not necessarily address all of part 70's permit content requirements, since some of those requirements are not found in the Federal regulations governing the State preconstruction programs. Thus, for States to provide automatic incorporation for changes that undergo a State review program, States may need to revise their regulations governing either their part 70 program or preconstruction review programs, to ensure that all of part 70's permit content requirements are addressed.

More Environmentally Significant Changes Reviewed by States. For purposes of establishing the adequacy of a State review program, today's proposal would divide changes subject to such review into two categories, those that are more environmentally significant and those that are less environmentally significant. The Agency proposes to include in the category of changes that are more environmentally significant the following:

- Any change subject to major NSR;
- Any physical change or change in the method of operation of a part 70 source associated with a project where the prospective emissions increases from such changes, considered by themselves, would be a significant emissions increase of any pollutant subject to regulation under part C or D of the Act;
- Any change subject to review as a modification under the regulations implementing section 112(g) of the Act; and
- Any other change determined by the permitting authority to have a similarly significant environmental impact.

The Agency has identified the types of changes listed above as being more environmentally significant because they either have been specifically identified in the Act for preconstruction or pre-operation review (i.e., major NSR under parts C and D or prior review under section 112(g) of the Act) or involve difficult judgments which affect whether construction activity would be subject to one or more of the reviews prescribed by Congress (i.e., minor NSR governing net-outs).

While all major NSR actions have been included in the category of more environmentally significant changes, EPA recognizes that in an extreme ozone nonattainment area any change at a major stationary source which results in *any* increase in emissions of nitrogen oxides (NO_x) or volatile organic compounds (VOC) from a discrete operation, unit, or other pollutant emitting activity is a modification subject to major NSR. In the South Coast Air Quality Management District (SCAQMD) of California, the only extreme ozone nonattainment area, potentially several hundred, if not several thousand, major modifications can occur each year under applicable definitions of major source (10 tons per year (tpy)) and major modification (any increase, as described above). As a comparison, in most areas of the country, a major modification does not occur unless there is an increase of 40 tpy or more of VOC.

Today's proposal would require that all changes in the more environmentally significant category meet the full public process requirements specified by the Federal regulations governing the underlying State review program. Thus, for all major NSR changes, including major modifications, the State permitting authority would have to provide (as is currently required) prior public notice and a 30-day public comment period. The Agency is concerned, however, that full NSR procedures may be unworkable for extreme ozone nonattainment areas in light of the ''any increase'' threshold for triggering major NSR for modifications in those areas. Some relief from the full NSR procedural requirements may thus be appropriate for smaller major NSR actions in extreme nonattainment areas. The Agency is considering a proposal to revise the Federal major NSR requirements to allow States to devise more streamlined public procedures for smaller actions in extreme ozone nonattainment areas, and it solicits comment on whether and how to provide such relief.

The Agency is proposing to include one category of minor NSR changes, i.e., certain net outs, in the more environmentally significant category. Net-outs are minor NSR actions which allow a source to avoid major NSR where the prospective emissions increases from changes associated with

a project considered by themselves would require major NSR except that the source makes a contemporaneous emissions decrease at the same site sufficient to keep the net increase below the major NSR applicability threshold. Netting transactions often involve some of the most complicated analyses undertaken by permitting authorities. They are also among the most important minor NSR decisions permitting authorities make, since they shield changes which significantly increase emissions from the control requirements of major NSR. The EPA is concerned about the number of net-outs that might be subject to today's proposal and the possible burden of requiring 30-day public review. The Agency solicits information from States on the number of net-outs that would fall within the proposed category of net-outs and the relative difficulty and complexity these net-out determinations would typically require. The EPA is also interested in learning from the experience of States and industry as to what percentage of net-outs involve a project where the prospective emissions increase from a single physical change or change in the method of operation is greater than the significance levels (as opposed to projects comprised of small changes that individually do not exceed the significance level but do exceed the levels when summed).

In including net-out transactions in the more environmentally significant category, EPA proposes to cover those changes where emissions increases from changes associated with a project, considered by themselves, would exceed major source thresholds or modification levels before including decreases at the source. In a moderate ozone nonattainment area, for example, where the major modification threshold is 40 tpy for VOC, a 50 tpy VOC increase that is offset by an 11 tpy decrease (net 39 tpy increase) would be classified as a more environmentally significant change, but a 35 tpy increase would not. In keeping with section 182(c)(6) of the Act, the definition of covered net outs would also include individual changes whose emission increases exceed cumulative major NSR applicability thresholds (e.g., 25 tpy over 5 years in severe and serious ozone nonattainment areas).

The Agency considered including in the category of more environmentally significant changes minor NSR limits that a source undertakes to keep its potential emissions below major NSR thresholds. These limits on emissions which create so-called ''synthetic minor'' sources or modifications account for many minor NSR permit actions, and play a critical role in shielding large sources or source modifications from major NSR.

The types of controls used to establish synthetic minors vary widely among States and sources. Many are straightforward in terms of the limit's effect on emissions and its enforceability. However, others are unique to a source and involve assessments of source-specific operational limits. Synthetic minor controls also vary in terms of their net effect on a source's emissions.

The Agency has decided not to propose inclusion of synthetic minor actions in the category of more environmentally significant changes, largely because of the difficulty of formulating a national definition of those synthetic minors that merit full public review procedures. Instead, it is proposing to include all synthetic minors in the less environmentally significant category of changes that undergo prior review. As subsequently explained in more detail, States have broad discretion to fashion revision procedures for this category that match public process to the environmental significance of the change. In light of the potential environmental significance of synthetic minor controls, however, EPA expects each State to identify the more significant types of synthetic minor actions it issues and afford these a substantial opportunity for public and affected State review prior to the State's final action in the minor NSR process.

Several factors would be relevant in identifying the more significant synthetic minors. One is the size of the source or modification before the synthetic minor control is applied. In some cases, the source or modification far exceeds the applicable major NSR threshold without the control. Another is the use of synthetic minor controls to reduce a source's emissions to just below the applicable major NSR threshold. In these cases, the control leaves little margin for error. A third factor to consider is whether the synthetic minor control entails the application of technology or other control measures whose effect on emissions is not well or easily established. In these situations, the permitting authority is required to exercise considerable judgment in determining the efficacy of the control. Depending on a State's situation and experience, synthetic minor actions meeting any one of these criteria may warrant providing prior public review. Where an action meets more than one of the criteria, e.g., where the source without controls is very large and the effect of proposed controls is not well established, an increased opportunity for prior public review and comment may be in order.

Finally, EPA is proposing that States have discretion to designate other types of actions for inclusion in the more environmentally significant category. As explained earlier, minor NSR controls vary by State in scope, type, stringency, and significance, and States may thus find it appropriate to include other types of minor NSR actions in the more environmentally significant category.

Adequate Review for the More Environmentally Significant Changes. For the more environmentally significant changes, permitting actions by a State would have to follow the full public procedures required by existing regulations (or in the case of section 112(g) of the Act, those defined in EPA's final implementing regulations) with respect to public (including affected States) and EPA notice and opportunity to comment. (As discussed earlier, for smaller major NSR changes in extreme ozone nonattainment areas, EPA is considering the need to revise the Federal NSR regulations to provide for less than full process for such changes.) In the case of minor NSR, the Agency is today proposing changes to the Federal regulations governing that program to clarify States' discretion in affording adequate public process. For net-outs, the only category of minor NSR changes that would be included in the more environmentally significant category, the proposed revisions of § 51.161 would clarify that such actions are subject to the full procedures set forth in the existing regulations.

The public process requirements for the more environmentally significant changes would include prior notice and a 30-day opportunity to comment on the permitting authority's proposed action on the source's application for the change. Affected States and EPA would also have to be notified and afforded the same opportunity to comment. Because the State review process would have to address any part 70 permit revision, the public notice of the change would have to contain draft part 70 permit terms as needed to revise the existing part 70 permit and to meet the part 70 permit content requirements of §§ 70.6(a) and (c).

Finally, EPA recognizes that in some situations part 70 permit terms based on decisions made in the preconstruction review process may require revision before the source can operate the change. In many of these instances, such changes arise from a shakedown period which the source undergoes prior to full scale operation. The Agency believes that, in general, shakedown changes are

being adequately addressed in the day-to-day implementation of State NSR programs, and that the State procedures afforded these changes should typically suffice for part 70 permit revision purposes. As with the change before shakedown, EPA would expect States to match the type and amount of additional review to the significance of the shakedown change. Only where a second major NSR process is necessary to review the change (i.e., the change would involve substantially new emissions or represent a fundamental departure from the previously approved project) would a full opportunity for public, affected State, and EPA review of the change be required.

Less Environmentally Significant Changes Subject to a State Review Program. All changes that are subject to a State review program other than those designated more environmentally significant would be included in a second (''less environmentally significant'') category. The changes in this second category would range from significant synthetic minor actions that shield sources from major NSR requirements to changes with minimal environmental impact. States would have the flexibility to vary the process provided for the changes in this second category with the relative environmental significance of the change. A State may designate certain categories of minor NSR changes, subject to EPA approval, as de minimis based upon its determination approved by EPA that meets the test prescribed by the *Alabama Power* case. For changes that fall in these de minimis categories, the State may forego prior public, affected State, or EPA review altogether.

As noted previously, most States already exempt at least some minor NSR actions from public process. In evaluating what changes may be considered de minimis, many factors are potentially relevant and will vary to some extent with States' varying situations. The scope of the de minimis category is properly determined on a State-by-State basis as permitting authorities develop program revisions to meet the revised part 70 requirements. In determining the coverage of the de minimis category, the State should examine the relevant factors in the context of the State's situation, subject its proposed findings to public review, and base its final determination on the relevant record. The State may accomplish this as part of the rulemaking to revise its program to conform with EPA's revised part 70 rule or in a separate rulemaking.

The most important factor for States to consider in identifying de minimis changes is the air quality in an area. Changes that are important in a nonattainment area may be of considerably less interest to the public (or EPA) in an attainment area. Due to differences in the nature of the air quality problems in different nonattainment areas, the need for or appropriateness of EPA and public involvement may also vary.

Another important factor is the emissions impact of the types of changes being considered for the de minimis category. In this context, the size of any emissions increase and the type of emissions involved are relevant. Smaller increases of relatively less harmful pollutants are more likely candidates for de minimis categorization.

Also relevant is the nature of applicable controls. Changes which are typically addressed by the application of well established control technology are not likely to require public scrutiny. Registration requirements pursuant to which sources must report, but not necessarily mitigate, emission increases below a specified threshold would in many States warrant an exemption from public review. On the other hand, public review may be appropriate for changes which require unfamiliar control technologies or source-specific determinations of control levels.

A State's prior experience with public interest in permitting decisions for particular types of changes is another factor the State may weigh. A State which does not now provide public notice and opportunity to comment on permit revisions for many or all changes could not use the lack of past public involvement in the permitting actions for those changes to establish a lack of public interest in them. On the other hand, if a State's experience shows the public does not comment or express interest in certain types of changes, the State could well conclude that such changes are de minimis. The public's response to the State's rulemaking to determine the scope of the de minimis category is similarly pertinent. The general compliance status of sources in the relevant jurisdiction may also suggest that more or less public oversight of permitting actions would be appropriate.

The factors described above are not mutually exclusive; for example, the size, complexity, and track record of particular types of changes, when considered together, may establish that de minimis categorization is or is not appropriate. The Agency further recognizes that other factors may also be relevant, and solicits comment on whether other circumstances should also be considered by States in determining the scope of the de minimis category.

In view of the nature and number of the factors described above, EPA anticipates that States' determination of de minimis changes will justifiably differ, even to a significant extent. In States with relatively extensive minor NSR programs, EPA would expect that the de minimis category could be established such that the majority of changes would be processed as de minimis but the bulk of total emission increases governed by minor NSR would be subject to public review. This is because, in the case of extensive programs, many or even most minor NSR changes typically involve very small emissions increases. The Agency is aware of one State, for example, in which 90 per cent of minor NSR changes involve emissions units of less than 5 tpy, and those changes together account for only about 10 per cent of total emissions increases governed by the program. In this State, defining a de minimis category at or below 5 tpy would mean that only 10 per cent of the changes by number would go through public and affected State review, but that review would cover 90 per cent of total emissions increases. Such an approach would be acceptable under today's proposal and would be an appropriate way to minimize the burden of the permitting program on sources and permitting authorities without compromising citizens' opportunity to participate in decisionmaking regarding the bulk of emissions increases.

By providing the above example, EPA does not mean to suggest that States need conduct the type of analysis described to determine an appropriate de minimis category. It is merely one example of an acceptable approach to defining de minimis changes. The Agency expects States to consider their particular situations and make determinations that are appropriate for their situations, in light of the relevant factors. In States with less extensive minor NSR programs and less significant air quality problems, for example, de minimis changes might be appropriately defined to include changes that increase emissions by as much as 25 tons. The Agency believes States are in the best position to weigh the relevant factors in determining what changes may be exempt from public review. A de minimis change category developed based on the factors discussed above would be granted substantial deference in EPA's review of States' part 70 program revisions.

Adequate Process for Less Environmentally Significant Changes.

For minor NSR actions not in the more environmentally significant category, States would have considerable discretion to match the amount and timing of process to the environmental significance of the change. In reviewing State programs, EPA would recognize States' need for flexibility in devising procedures that take into account the relevant factors for a particular State, including existing air quality levels and the scope and complexity of its minor NSR controls. States would have to afford an adequate opportunity for public participation for all changes other than de minimis changes, but could use various methods including prior or after-the-fact notice and comment periods, batch processing, and the use of general permits or permits by rule. For the least significant changes, States could provide little public process beyond a notice in some manner to the public, which could be after the change occurred. Notice could be given by means other than newspapers where alternative methods, such as State registers or computer bulletin boards, are generally accessible by interested persons. States should require prior notice and comment where actions involve larger emissions that warrant greater scrutiny because of their environmental significance, although comment periods need not be 30 days where a shorter period such as 15 days or less would likely be sufficient in view of the significance or complexity of the change.

All minor NSR actions (including those de minimis changes exempted from public and EPA review) would have to be reviewed by the permitting authority to assure that the change met all applicable requirements and the part 70 permit requirements of §§ 70.6(a) and (c). In particular, changes to monitoring methods in part 70 permits would have to be specifically approved by the permitting authority as adequate for determining compliance with applicable requirements and part 70 permit terms prior to revising the permit.

Program Revisions for NSR Changes. States could revise their regulations as needed to provide for adequate review of minor NSR changes in two ways: (1) Revise their minor NSR regulations as necessary to meet the requirements outlined above, or (2) revise their part 70 program regulations to provide that those requirements be met in the context of the NSR review process. Either approach would ensure that adequate process is provided, so a State may be given the flexibility to decide which approach would be most suitable for it.

Comparison of Proposed Approach and Current Part 70 for Minor NSR Changes. Before describing the proposed approach for changes not subject to a State review program, the Agency would like to compare its treatment under today's proposal of minor NSR changes to what is currently required under part 70. The minor NSR process is the origin of the vast majority of changes occurring at part 70 sources which cause the need for a part 70 permit revision. It is therefore helpful to compare these two regulatory approaches to understand the relative effectiveness of the proposal in accomplishing streamlining. This discussion addresses, in order, minor NSR changes that would be considered more environmentally significant, synthetic minors, other minor NSR changes that conflict with the part 70 permit, and finally other minor NSR changes that do not conflict with the part 70 permit.

For minor NSR changes which would be classified as more environmentally significant changes under today's proposal (i.e., major net-outs), both the current and proposed part 70 would subject the change to a full public and EPA review process involving a 30-day public comment period. Today's proposal, however, would impose this requirement in conjunction with the otherwise occurring State minor NSR process. This is a much faster and more efficient process than under the current part 70 where the sequential significant permit modification process would be imposed (possibly for up to 18 months) after the NSR process has been completed (unless the State chooses to enhance its minor NSR process)[3].

Whereas part 70 imposes the significant permit modification process for synthetic minors, these would be considered in the less environmentally significant category and subject under today's proposal to a more streamlined combined process matched to the environmental significance of the changes. In addition to shortening greatly the time to complete permit revisions via combination of the part 70 process with other State review processes, today's proposal would also limit EPA's review role for less environmentally significant changes during the first 5 years after program approval. This would add greater certainty to the critical initial implementation of the program.

Other types of minor NSR changes that conflict with the terms of the part 70 permit would be required to be adopted as a permit revision before operation under both today's proposal and the current part 70. Under today's proposal, EPA expects States to treat these either as de minimis, for which no public or EPA review would be required, or as being within the category of less environmentally significant changes for which process would be matched to environmental significance of the change. For the least significant of these changes (other than de minimis), States could provide little public process beyond a notice in some manner to the public, which could be after the change occurred. The only EPA review for any of the less environmentally significant changes over the first 5 years after program approval would be in the event of a citizen petition. Under the current part 70, most of these changes, (including those considered de minimis under today's proposal), would be processed as minor permit modifications. For minor permit modifications, even though the change may be made immediately upon sending a notice to the permitting authority and there is no public review, the uncertainty resulting from EPA's 45-day review period and possible objection after-the-fact is a significant concern to sources making changes under this process. Thus, under today's proposal, a key benefit for these changes is the 5-year waiver of EPA's objection (except in response to citizen's petitions) and the exclusion of public, affected State, and EPA review for de minimis changes.

Today's proposal does not differentiate between those minor NSR changes that conflict with the terms of the part 70 permit and those that do not. The current part 70 does allow States to make this distinction. Specifically, source changes reviewed under minor NSR that do not conflict with the terms of an existing part 70 permit may be treated under the current part 70 as off-permit, meaning the terms and conditions of any resulting minor NSR permits need not be incorporated into the part 70 permit until renewal. For changes that qualify for off-permit treatment, the source must provide contemporaneous notice to both EPA and the permitting authority. This notice requirement is in addition to the review process required under the

[3] Where a part 70 permit revision is needed, part 70 currently allows the State to enhance its minor NSR process with additional substance (e.g., other requirements where applicable and part 70 duties to certify compliance and report every 6 months) and process (e.g., additional EPA and public review as necessary to meet § 70.7(e)) to meet the part 70 permit revision requirements and thus revise the part 70 permit concurrent with the NSR process. This optional ''enhanced NSR'' approach closely resembles the approach in today's proposal for the required integration of part 70 review with the minor or major NSR process (as applicable).

State's minor NSR program. The requirements of § 70.6 would of course not attach until the off-permit change is incorporated into the part 70 permit at renewal. A change that is not off-permit (either because it conflicts with the existing part 70 permit or because the State has chosen not to allow for off-permit) and that is neither a net-out nor a synthetic minor could be treated as a minor permit modification.

D. Incorporation of Changes Not Subject to State Review Programs

The EPA expects that the great majority of changes requiring a part 70 permit revision would qualify for automatic incorporation because they are subject to a State program such as minor NSR. However, for changes that are not subject to such review, States would have to provide for a revision process at the part 70 permitting stage. Depending on the scope of the State's minor NSR program, such processing would be needed for changes that trigger RACT, MACT, or other applicable Act requirements but not minor NSR, or for changes to terms that were established only through the part 70 permit process. As for changes that are subject to State review programs as previously described, full public, affected State, and EPA review would be required only for the more environmentally significant of these changes. For less environmentally significant changes that are not subject to State review programs, States could develop revision procedures that match the process to the environmental significance of the change.

More Environmentally Significant Changes Not Subject to State Review Programs. Under today's proposal, opportunity for public, affected State, and EPA review equivalent to that provided for permit issuance or renewal must be afforded for the more environmentally significant changes *before* the part 70 permit is revised and the change is operated. For changes that are not subject to State review programs, EPA proposes to define the more environmentally significant category as including the establishment or revision of the following:

(1) MACT determinations made under section 112(j) of the Act;

(2) Alternative emission limits to meet section 112(i)(5) of the Act (early reductions);

(3) Alternative limits established pursuant to § 70.6(a)(1)(iii) including any to implement RACT as authorized by the SIP or any substitute section 112 standards established pursuant to a program approved by EPA under section 112(l) of the Act;

(4) New or alternative monitoring methods that have not been authorized for adequacy under major or minor NSR or under regulations implementing section 112(g) of the Act;

(5) (Establishment only) Emissions limits restricting the potential to emit (PTE) of an entire source, including the establishment of any plantwide applicability limit (PAL) for defining applicability of NSR or of regulations implementing section 112(g) of the Act.

In revising part 70 permits to establish or change (except for PTE limits) any of the above permit conditions, the State's part 70 program would have to provide public, affected State, and EPA process focused on the change equivalent to that afforded for initial permit issuance. The permitting authority would also have to design and implement this process so as to complete review of the majority of these types of permit revisions within 6 months of receipt of an application for such a revision. The requested change could only be made as allowed by the underlying applicable requirement(s). The EPA is proposing to reduce the processing time for the majority of these changes from the 9-month period specified in the current rule to 6 months to promote necessary streamlining and to minimize undue delays. The Agency, however, solicits comment on the feasibility of a 6-month turn-around time and on other time periods which might better accomplish these objectives.

The proposed list of the more environmentally significant changes not otherwise subject to State review focusses the most extensive review procedures on a relatively manageable number of changes that involve actions that have, or potentially have, the greatest environmental consequences. Congress clearly intended that the limits associated with section 112(j) MACT decisions and early reductions be determined in the context of the title V program. Section 112(j) targets implementation after the effective date of the title V program, requires applicable sources to file a permit application, and requires the MACT limit be placed in a title V permit. Similarly, Congress in section 112(i)(5) required the title V permitting authority to establish in a title V permit an enforceable emissions limitation for hazardous air pollutants (HAPs) reflecting the early reduction which qualifies the source for an alternative emission limitation exemption from MACT.

The EPA is also proposing to include in the more environmentally significant list alternative emission limits as authorized by an approved SIP or program under section 112(l) of the Act. Limits such as alternative RACT or MACT are analogous to the two preceding types of limits identified by Congress for title V implementation. Accordingly, they warrant extensive review to assure that general criteria contained in a SIP or a plan approved pursuant to section 112(l) of the Act are applied in a reasonable and enforceable fashion to a particular source change. Moreover, as explained subsequently, EPA's objection opportunity under today's proposal would fully extend only to the more environmentally significant categories of changes. Since under section 110 of the Act EPA must be able to object to alternative SIP limits for them to qualify as such, it is important to include alternative SIP limits in the more environmentally significant category of changes. The EPA solicits comment on whether full public, affected State, and EPA review are necessary for alternative MACT standards established under a section 112(l) program or whether a lesser degree of public, affected State, and EPA review would be adequate.

The establishment of limits on the PTE for an entire source or plantwide emissions caps (see below) also warrants a similarly high level of review. Development of such limits involves a comprehensive review of a source's emissions to restrict a source's emissions to below major source thresholds. Because of the extensive nature of these reviews, the Agency believes that a 30-day public review period is warranted for establishing such caps. While proposing these actions as being more environmentally significant, the Agency does solicit comment as to whether the establishment of (as well as revisions to) PTE limits can be classified as less environmentally significant, particularly for limits related to the applicability of minor NSR.

Finally, the Agency believes that changes involving shifts to new or alternative monitoring approaches not otherwise matched to the source (e.g., through a prior review) can often have potentially large environmental impacts, because a new or different monitoring regime could inadvertently allow emissions to increase without causing a violation of the applicable requirements. The process reserved for more environmentally significant changes is appropriate to safeguard the integrity of the compliance conditions of the permit unless another prior review serves this function (e.g., major or minor NSR under today's proposal). Permitting authorities could approve such changes only where the new or alternative monitoring or recordkeeping method was determined adequate to assure

compliance with the applicable requirement.

The EPA solicits comment on whether any other changes not subject to State review programs should be designated for inclusion in the more environmentally significant category.

Other Changes Not Subject to State Review Programs. For all other categories of changes for which a part 70 permit revision is required but that are not otherwise subject to State review, a State could develop a process that matches the review to the environmental significance of the change. These categories of changes include, but are not limited to:

(1) Revisions to emission limits restricting the PTE of an entire source or any emissions unit, including any PALs for defining applicability of NSR, or of regulations implementing section 112(g) of the Act;

(2) Restrictions on the PTE of any emissions unit;

(3) Unique limits designed to meet an applicable requirement;

(4) New alternative operating scenarios;

(5) Changes within the same monitoring method, or ''intra-monitoring changes;''

(6) Incorporation of MACT compliance details, including applicability and compliance parameter level decisions; and

(7) Emissions averaging restrictions made pursuant to a standard under section 112(d) of the Act.

For these changes, States again might use various methods to provide adequate public participation, including prior or after-the-fact notice and comment periods. As noted earlier, sources often take limits on the PTE of an entire source to avoid being subject to more stringent requirements that otherwise apply. Sources even more frequently take limits on an emissions unit at the source to keep the unit below major modification thresholds. Revising plantwide caps or establishing or revising PTE limits for an emissions unit involve making judgments regarding the sufficiency and practical enforceability of a limit on maximum allowable emissions which, if exceeded, would trigger the applicability of more environmentally significant requirements. For this reason and as with significant synthetic minor NSR actions, EPA would expect States to provide relatively more public process for significant changes to PTE limits or caps. It would make little sense to require full process to establish such plantwide limits or caps if they could be revised with little or no process. Also, the relative environmental significance of MACT applicability and compliance parameter decisions can vary with the particular MACT standard involved. The EPA, in promulgating individual MACT standards, will provide guidance whenever it believes States should provide public or EPA review during the permit process.

For those categories of changes that are determined by the permitting authority to be de minimis, States may incorporate these changes into part 70 permits without prior review by the public, affected States, or EPA or an opportunity for EPA objection or for citizens to petition EPA to object. The previously described considerations relevant to identifying de minimis changes subject to State review programs are also relevant in determining that categories of changes *not* otherwise subject to State review are de minimis. States could also exempt from public and EPA review on de minimis grounds changes that qualify for administrative amendment treatment under section 70.7(d) of the current part 70 rule. These include changes which correct typographical errors, require more frequent monitoring or reporting by the permittee, or alter ownership or operational control of a source. The State would also identify other inconsequential changes as de minimis and submit a list of those changes to EPA when submitting part 70 program revisions for approval. Either the permittee or the permitting authority could initiate the incorporation of any such change into the permit by issuing a notice describing what information in the part 70 permit is affected and sending the notice to the permitting authority or the permittee as appropriate. The notice would identify the terms of the existing part 70 permit being changed and any new terms needed to meet part 70 permit content requirements. The notice would revise the permit upon its mailing by the source to the permitting authority through certified mail. No affirmative authorization by the permitting authority would be required if the permittee initiates the change.

Under today's proposal, the State part 70 program could also provide that changes need not undergo State, EPA, or public review before they are incorporated into the part 70 permit, provided that (1) they can be operated in compliance with all applicable requirements and the federally-enforceable terms of the existing part 70 permit, and (2) the applicable requirements they trigger do not entail source-specific determinations in applying the requirement to the source.

As previously noted, many minor NSR programs exempt from minor NSR altogether changes that do not increase emissions above a certain amount, or that are of a particular type or category. These changes may nonetheless still be subject to applicable requirements such as NSPS or SIP requirements. A small storage tank, for example, may be exempt from NSR in certain States, but still may be subject to RACT or NSPS requirements.

To the extent these changes do not conflict with the part 70 permit and do not trigger requirements that entail source-specific tailoring, EPA is proposing that they may be exempt from any additional public, affected State, or EPA review in the part 70 process. The State part 70 program could provide that the source may operate the change upon submitting a notice, provided that the change can be operated in compliance with the existing part 70 permit. In the notice, the source would describe the change, describe any new permit terms needed to assure compliance with all applicable requirements and relevant part 70 requirements, and certify that the change is eligible for this process. The part 70 permit would be revised upon mailing of the notice by the source to the permitting authority by certified mail. No permit shield would attach to changes so incorporated into permits, since not even the permitting authority would have reviewed whether the source correctly identified all of the Act requirements applicable to the change.

E. Opportunity for EPA to Object and Permit Shield

Under section 505 of the Act, the Administrator is to receive and review copies of permit applications, including applications for permit revisions, and to object to the issuance of any permit which contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of the Act, including title V requirements. If the Administrator does not object to a permit within the 45-day review period specified by the statute, any person may petition the Administrator to do so within 60 days of the expiration of the 45-day review period. Under the Act, the Administrator may waive the requirements for receipt and review of permits for any category of sources covered by the part 70 program other than major sources.

In fulfilling its review role with respect to permit revisions, EPA will consider whether (1) all applicable requirements and part 70 requirements to which the source is subject as a result of the change are contained in the permit revision, (2) the new or revised permit terms and conditions are enforceable as a practical matter, and (3) significant procedural requirements relating to adequate public participation

and development of a supporting record have been met.

At the same time, EPA wants to minimize the potential for Agency review to lengthen unduly the permit revision process. The Agency is thus proposing to limit its review and objection opportunity in several ways that will focus EPA's limited resources on providing a timely reaction to the more environmentally significant permit revisions.

First, for the more environmentally significant changes (including those that are subject to a State review program and those that are not), EPA is proposing that the Agency would be required prior to the permitting authority taking final action on the change to raise any objections to the proposed change for any defect that was reasonably apparent during the public review period. Failure by the Agency to raise a timely objection would bar it from objecting to issuance of the permit revision, except in response to a citizen's petition under section 505(c). The Agency could still reopen the permit for cause under section 505(e) of the Act and § 70.7(g) of the current rule.

Second, changes which the State proposed and EPA approved as de minimis under the *Alabama Power* test would not be subject to any EPA review or objection opportunity or citizen petition opportunity prior to renewal of the part 70 permit. Changes which meet the *Alabama Power* de minimis test are by definition environmentally insignificant, and EPA is therefore proposing to exercise its inherent administrative authority to exempt such changes from the public, affected State, and EPA review and objection opportunities that otherwise apply prior to permit renewal. To the extent de minimis changes are improperly made or incorporated into the permit, corrections can be made by reopening the permit or when the permit is renewed with little or no cost to the environment, provided the changes are in fact de minimis.

Third, for the less environmentally significant changes that do not qualify as de minimis, EPA is proposing to limit its review and objection opportunities for at least the first 5 years following program approval. For such changes, EPA would object to a change only in response to a citizen's meritorious petition under section 505(c) where the permit revision at issue would likely lead to significant adverse environmental consequences. During the 5-year period, the Agency would rely on consultation with State officials and audits of State programs to assist and monitor implementation of the permit revision process with respect to changes in the less environmentally significant category. Depending on what the audits reveal, the Agency would revise as appropriate the time period or scope of the above-described limit on its objection authority. The EPA contemplates extending the waiver in States where the audit reveals no significant problems due to the waiver, and reinstating the objection opportunity in States where the audit shows otherwise.

For changes in the more environmentally significant category, EPA would maintain its full authority to review and object to permits on its own and in response to a citizen's petition. While the Agency does not plan to routinely review all or even most of these changes, EPA believes it should retain its authority to do so in light of the potentially large emission increases such changes entail.

The Agency believes today's proposed approach to exercising its review and objection authority would facilitate efficient implementation of the proposed changes to the part 70 permit revision process. Other aspects of today's proposal would improve the integrity of part 70 permit revisions by ensuring public participation commensurate with the environmental significance of the change and public access to all permit revision decisions. To the extent that potential public involvement increases, there is less need for regular EPA oversight. The Agency also recognizes that the first years of implementing any new or revised program are the most challenging. States will need time and flexibility to work through the many new issues that will inevitably arise as they begin to implement a revised permit revision system. States are more apt to seek out EPA's help in addressing difficult issues of first impression if EPA is in the role of colleague rather than overseer.

Beyond that, EPA's own resources are limited. The Agency believes that its resources would be best used to focus on the more environmentally significant changes and to assist and audit States' implementation of their programs. The Agency could, as an exercise of its enforcement discretion, simply refrain from objecting to less environmentally significant changes. The Agency believes, however, that to realize the full benefits of its proposed approach to exercising its objection authority, a regulatory limit is necessary. Regulations specifying EPA's role in the permit revision process would best inform the public, States, and sources as to what to expect and allow them to plan accordingly. Particularly in the first critical years of program implementation, a regulatory limit would provide an important measure of certainty and stability at a time when all affected groups are learning the new system.

The EPA is proposing a limit on its authority that would coincide with States' early efforts to implement the revised program. The limit on its authority would start upon approval of each revised State program that implements these revisions to part 70 and would continue for 5 years.

During the 5-year period, EPA would work with States to facilitate a smooth transition to the revised program. Once State program revisions were up and running, the Agency would also conduct audits to determine States' performance in meeting minimum program requirements. In conducting its audits, EPA would make use of the applications for permit revisions that States are required by section 505(a) of the Act and § 70.8 of the current rule to send to EPA. Based on the results of these audits, EPA would decide whether to revise the regulations to suspend or extend the limit on its objection authority for particular States or States in general.

An important safeguard in EPA's proposed approach is the ability of citizens to petition the Agency to object to a permit revision under section 505(c). If a citizen's petition brings to EPA's attention a permit revision that allegedly fails to fully or accurately incorporate all applicable requirements, including title V requirements, or for which required opportunities for public review were not provided, the Agency would review the revision for possible objection. Where its review revealed an environmentally significant error in the permit revision, EPA would object. For instance, an EPA objection would be warranted in the case of a permit revision that purported to establish or revise limits on a source's potential to emit to avoid application of major NSR if the permit revision would in fact allow increases above major NSR thresholds. On the other hand, errors that did not have an adverse environmental effect would not warrant an EPA objection. Correction of such errors could await permit renewal with little or no cost to the environment and with significant potential savings to the source.

As a further safeguard, a permit shield would *not* be available for permit revisions to incorporate changes in the less environmentally significant category unless they were revised and approved by EPA in response to a

citizen's petition. In other words, if EPA were to find that a source was not complying with an Act requirement that became applicable to the source as a result of such a change, the Agency could take enforcement action against the source for its non-compliance. The chance that a permit revision would somehow incorrectly incorporate applicable requirements due to a lack of EPA review would thus be offset by the prospect of EPA enforcement of underlying applicable requirements.

In summary, EPA believes that the benefits of limiting its objection authority with respect to the less environmentally significant changes outweigh the potential risk of the limitations, particularly in view of citizens' petition opportunity. The Agency solicits comment on its proposed limitations and on its legal authority to establish them.

Several parties have asked EPA to clarify how it would implement EPA's objection opportunity for changes that have previously undergone major NSR or minor NSR where a citizen petitions for an EPA objection and the alleged error would have a significant environmental affect. Section 505(b) of the Act provides for an objection if the permit ''contains provisions . . . not in compliance with the applicable requirements of this Act, including the requirements of an applicable implementation plan.'' To assure that the permit contains provisions that are in compliance with all applicable requirements of the Act, including SIP requirements, EPA would review a change resulting from a NSR action to see if the terms of the NSR permit were properly incorporated into the part 70 permit, if the terms are enforceable, and if the applicable substantive and procedural requirements for public review and development of supporting documentation were followed. For major NSR, EPA would review the process followed by the permitting authority in determining best available control technology (BACT) or lowest achievable emission rate (LAER) to assure that the required SIP procedures (including public participation opportunities) were substantially met[4] and that any determination by the permitting authority was properly supported, described in enforceable terms, and consistent with all applicable requirements.

The EPA's purpose in reviewing whether an NSR action was consistent with all applicable requirements would be to assure that any BACT requirements were at least as stringent as any other applicable requirements such as an NSPS and that any minimum control requirements specifically articulated in the SIP were met. The EPA would not second-guess case-by-case technology determinations that meet the minimum criteria set forth above. For more environmentally significant changes subject to minor NSR, EPA would also examine the calculations used to base any decision that minor rather than major NSR was applicable to the change.

At the discretion of the permitting authority, the permit shield would be available for changes in the more environmentally significant category, in view of the public, affected State, and EPA review opportunities provided for those changes. For all other changes, the permit shield would be available only for terms that are reviewed, revised, or added by EPA in response to a citizen's petition.

For permit revisions other than those for de minimis changes, citizens would have 60 days after the expiration of any EPA opportunity to object, or from the time the permitting authority notified the public as to its approval of the permit revision, to petition the Administrator to make such objection. As in the current part 70, any petition would (1) have to be based only on objections to the permit which were raised with reasonable specificity during any prior opportunity for public comment (unless the petitioner demonstrates that it was impractical to raise such objections at that time); (2) have to be based on germane and non-frivolous grounds; and (3) have to raise issues related to the incorporation of or correctness of applicable requirements, enforceability, or procedural requirements concerning public review consistent with EPA's ability to object.

The EPA would like to avoid unnecessary petitions wherever possible. Accordingly, the Agency suggests that concerned citizens work with EPA early on in the process to resolve as many concerns as possible before they rise to the level of a formal petition.

The Agency is aware of industry concerns that uncertainty is created by allowing citizens to petition EPA to object to less environmentally significant changes. Because such changes by their nature are less environmentally significant, industry has suggested that the opportunity for citizens' petitions be postponed until permit renewal. The EPA believes that such postponement conflicts with the explicit provisions of section 505(b)(2). Moreover, as explained previously, at least some type of changes in the less environmentally significant category have large potential environmental consequences because they shield a source from more stringent environmental controls. The Agency has attempted to address industry concerns by allowing States to notify the public of permit revisions on a batched basis where sources must make changes frequently (see following Section II. F. *Flexible Permits*). The EPA also solicits comment on whether there is a legal basis for postponing the opportunity for citizen petitions on less environmentally significant changes until permit renewal.

F. Flexible Permits

Aside from providing streamlined permit revision procedures, a permit system can promote source flexibility by providing opportunities to design a permit which will minimize the need for permit revisions. Many ways have been identified to achieve this, including use of worst case limits and alternative scenarios (56 FR 21748–49, May 10, 1991). In addition, as the July 21, 1992 preamble to the final part 70 rulemaking stated, there are no limitations on changes which do not trigger any applicable requirements and which are not prohibited or addressed by the permit.

Section 502(b)(10) of the Act requires States to design their title V programs to allow changes to be made at a source without revising the source's title V permit so long as the change does not exceed the emissions allowable under the permit and does not constitute a ''modification under any provision of [title I of the Act].'' The current rule implements section 502(b)(10) by providing sources with a potential means of establishing emissions caps in part 70 permits. Caps may be designed such that changes can be made at a source without triggering reviews which can produce additional applicable requirements (e.g., NSR or section 112(g) requirements), and thus the need for a permit revision, provided emissions do not exceed the cap. The current rule further provides that sources granted such a cap may comply with the cap through emissions trading as provided by the terms of the cap.

As discussed in the August 1994 proposal, EPA believes that the flexibility afforded by section 502(b)(10)

[4] The Agency would only object to a part 70 permit for procedural errors where EPA determined that the process required by the SIP was not followed and, as a result, ''the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the [permit] would have been significantly changed if such errors had not been made.'' This is the same standard courts are to apply in reviewing Agency procedural mistakes under the Act (see section 307(d)(8) of the Act).

is a mandatory minimum element of State permit programs. In that notice, the Agency proposed to revise the current rule to require States to establish a cap in a source's permit at the source's request, so long as the source proposed a cap that met the terms of section 502(b)(10) (as well as the enforceability requirements set forth in § 70.6). In addition, the Agency proposal would require the permit applicant to include in its application proposed replicable procedures and permit terms that ensure the emissions cap is enforceable and trades pursuant to it are quantifiable and enforceable. Any permit terms and conditions establishing such a cap or allowing such trading could be established only in a full permit issuance process. The permitting authority would not be required to include in the cap or emissions trading provisions any emissions units where the permitting authority determined that the emissions were not quantifiable or where it determined that there were no replicable procedures or practical means to enforce the emissions trades. The permit shield described in § 70.6(f) could extend to terms and conditions that allowed such increases and decreases in emissions.

As discussed in the July 1992 preamble (57 FR 32267–8) and in the August 1994 preamble (59 FR 44471–2), EPA encourages the development of trading provisions in part 70 permits consistent with section 502(b)(10). As allowed in the SIP, the Agency believes that an important option for flexibility can be established through part 70 trading conditions which are specific enough so that any source authorized to use them has a clear method of demonstrating compliance through the trading program without the need for a permit revision. As described in more detail in the July 1992 preamble, the trading procedures approved into the SIP must assure that each trade is quantifiable, accountable, enforceable, and based on replicable procedures and meets the underlying requirements. One example of the type of trading program which could provide such flexibility is the open market trading system proposed on August 3, 1995 (60 FR 39668). Under this approach, EPA intends to allow sources to engage in trading of ''discrete emissions reductions'' to achieve compliance with those applicable requirements authorized for such compliance in the SIP and in the permit. Another example would be the ''emissions budget'' program, such as the acid rain program for sulfur dioxide, under which sources can use allowances to meet the underlying requirements. It is currently envisioned that the part 70 permit need only contain a generic trading provision requiring that sufficient discrete emissions reductions be held to meet those applicable requirements which are open for trading. Permit revisions would not be needed to implement any trades, but the trading rule may mandate that the part 70 permit contain certain reporting and recordkeeping obligations to assure the integrity of the trades themselves.

Another option for flexibility described in the August 1994 proposal allows the part 70 permit to contain ''advance NSR'' provisions to the extent compatible with State NSR requirements. Such advance NSR provisions provide for including the result of the preconstruction review process up front in the operating permit, including any part 70 permit terms needed to address such future change(s). Such a provision, however, must be compatible with the constraints of the applicable requirements (e.g., limits on the term of a BACT determination) and be developed with its implications of those requirements in mind (e.g., possible consumption of the PSD increment). Many States should immediately be able to rely on this provision to avoid the need for a separate NSR permit or an operating permit revision to be issued when the source actually makes the change. Even where the issuance of a preconstruction permit is required, the need for a part 70 permit revision can still be avoided unless the NSR process results in new or different terms that must be placed in the part 70 permit.

Several questions have arisen regarding the practicality of such caps and advance NSR provisions. Concerns have been raised that these opportunities would be severely limited by section 502(b)(10) of the Act. While allowing certain changes at a source to occur without a permit revision, this provision excludes title I modifications from this relief and subjects eligible changes to a 7-day advance notification requirement.

The EPA believes that section 502(b)(10) was enacted by Congress to provide additional flexibility to sources and not to restrict any flexibility that already may be available under the regulations governing applicable requirements. For example, section 502(b)(10) would not preclude the incorporation into a part 70 permit of an NSR permit which defines how future changes at a source could occur in a manner that would meet the relevant NSR requirement. The part 70 permit itself may also define the scope of future NSR obligations for the source so long as this is allowed under the State's permitting program. No NSR requirements are circumvented under such an approach. Rather, compliance is determined beforehand so that the source may operate the pre-approved change without first obtaining a permit revision. The source would effectively have a blueprint analogous to a type of alternative scenario under which to operate if any of the pre-approved NSR changes were to occur.

The exact design of an emissions cap to meet § 70.4(b)(12)(i) of the August 1994 proposal and section 502(b)(10) will depend on the nature of the prospective source operation and the scope of the relevant applicable requirements, including the State's NSR programs and of regulations implementing section 112(g). For example, in one State it may be possible to define a PAL (or series of PALs) which defines when such requirements would be triggered. In other situations (e.g., where minor NSR applies and requires a case-by-case technology review whenever new capacity would be established), the PAL or series of PALs would need to be coupled with an advance NSR provision to address all NSR situations including those requiring an advance technology review of any changes for which pre-authorization was sought under the PAL.

Concerns have been raised that the 7-day advance notice provision of section 502(b)(10) could hinder a source's ability to respond quickly to changing market conditions by making changes already authorized under a cap. The Agency believes that the section 502(b)(10) notification requirement can be met by a generic notice describing a class of trades authorized by the permit and the source's intent to engage in such trades during a specified period of time. This notice must be sent at least 7 days prior to initiating trading of emissions under the cap, which incidentally could require notification during permit issuance where a facility intends to trade as soon as it receives its permit.

Concerns have also been raised that caps created pursuant to the regulations at § 70.4(b)(12) implementing section 502(b)(10) would be severely limited if the Agency were to interpret the title I modification limitation in 502(b)(10) to *in*clude changes subject to minor NSR. As discussed in the next section of this preamble, (see Section II. G. *Title I Modifications*), the Agency is proposing to add regulatory language that defines the scope of title I modification to clearly exclude modifications subject to States' minor NSR programs. This action

would directly resolve these concerns. Thus, under today's proposal, this definition of title I modification will enhance the ability of sources to design emissions cap permits pursuant to section 502(b)(10).

To promote greater certainty in implementing caps under section 502(b)(10), the Agency proposes to codify into the part 70 regulations the previous clarifications regarding emissions caps and advance NSR provisions. Under today's proposal, EPA would build upon its August 1994 proposal by defining in § 70.2 advance NSR, alternative scenarios, emissions cap permits, and PALs. The Agency further proposes to add to § 70.4(b)(3) the obligation to issue emissions cap permits pursuant to § 70.4(b)(12)(i) (regarding the mandatory nature of emissions caps) as the Agency proposed to revise it in the August 1994 proposal. This would require a permitting authority to accept enforceable permit conditions proposed by a part 70 source that (1) establish limits that keep the source from being subject to requirements that apply above the limit and (2) assure compliance with requirements applicable to future operations in which the source may engage so as to avoid permit revisions. These conditions would be established during permit issuance or permit revision procedures for the more environmentally significant changes.

To illustrate the type of flexibility that is available using a part 70 created cap incorporating advance NSR, the Agency refers readers to a draft permit providing a plant-wide emission limit for a semiconductor facility. A copy of this permit is available in the docket for this rulemaking. This permit, when final, will include terms that allow the source to undertake process changes without a permit revision by combining an emissions cap on HAPs that renders the source a synthetic minor and an emissions cap on criteria pollutants with an advance NSR provision authorizing certain types of changes involving VOCs and specific exemptions for insignificant activities and emissions. Under this draft permit, the source's routine changes will not trigger a part 70 permit revision obligation so long as: (1) Each change complies with applicable RACT and SIP requirements; (2) each change triggers no newly applicable requirement; and (3) total emissions do not exceed an aggregate emission limit for VOCs. This permit also incorporates additional conditions for pollution prevention planning, reporting, and training to assure compliance with the emissions cap. The final permit will also contain monitoring and other conditions sufficient to demonstrate compliance with the VOC emission limit.

While this permit is not yet final, EPA considers the basic approach used in this permit as acceptable and appropriate under part 70 and anticipates that it will serve as a useful model which offers operational flexibility in an environmentally protective framework. When a final decision is made on the specific permit, it will be placed in the docket for today's rulemaking.

The EPA encourages the use of the approach employed in the draft permit by permitting authorities seeking to minimize administrative burdens and maximize the flexibility of regulated facilities, particularly those which make frequent process changes that have a relatively small impact on emissions. The EPA does note, however, that the terms and conditions needed to meet minor NSR in advance may well vary from State to State. In particular, States with case-by-case control requirements approved as part of their minor NSR programs may require more specific conditions to allow sources to qualify for advance NSR. The EPA solicits comment on the acceptability and effectiveness of this approach.

Concerns have also been raised regarding the vast quantity of trivial changes that can occur each year at certain sources, including those in the electronics sector. These changes are peripheral to the core processes of a source and often do not affect emissions. In these cases, other types of advance NSR conditions are potentially useful. In particular, the part 70 permit can define in advance a list of activities which the permitting authority acknowledges are not physical changes or changes in the method of operation and therefore do not trigger minor NSR. Such changes when they subsequently occur would not precipitate the need for a part 70 permit revision, since they would not trigger minor NSR. The list of these activities developed by the Oregon Department of Environmental Quality which EPA has placed in the docket serves as an example of what might be defined in individual permits.

Finally, the Agency would like to clarify that NSR registration provisions under an EPA-approved minor NSR program that only require reporting of changes in emissions levels, provided total emissions stay below certain prescribed limits, could often be treated in the part 70 permit as a generic requirement which requires any necessary reporting or notification by the source to the permitting authority but does not require a revision to the permit. Alternatively, implementation of such NSR registration rules would be eligible for permit revision by source notice (see the previous discussion, *Other Changes Not Otherwise Reviewed by States*) where the applicable requirement itself allows for updating the permit through a notification procedure. Where neither of these approaches to SIP-required NSR registration can be implemented (e.g., State requires individual permit revisions for each transaction), the Agency solicits comment on the ability to allow permitting authorities to collect and batch process changes over a month's time period and conduct one part 70 permit revision at that time. This option would be available only for those changes that were defined by the program as being individually eligible for this treatment and that did not conflict with the part 70 permit.

G. Title I Modifications

The meaning of the section 502(b)(10) limitation, ''modifications under any provision of title I,'' has been disputed since the rule's promulgation. In its proposed rule to revise the criteria for granting State programs interim approval (59 FR 44572 (August 29, 1994)), EPA proposed that the phrase ''modifications under any provision of title I'' would include not only changes subject to the major NSR requirements of parts C and D of title I but also those subject to minor NSR programs established by the States pursuant to section 110(a)(2)(C), which is also in title I. Based on that reading, EPA in August 1994 proposed in part to interpret the title I modification language of the current rule (which is found in the provisions governing minor permit modification procedures and off-permit as well as those implementing section 502(b)(10)) to include minor as well as major NSR.

In response to the August 1994 proposal, EPA received many comments from industry and States strongly contending that the proper interpretation of the title I modification limitation of the current rule should be read to *ex*clude minor NSR. These commenters noted that EPA had itself effectively defined the term to exclude minor NSR in the preamble to the May 1991 proposed rule (56 FR 21746–47 and footnote 6). They argued that commenters on the May 1991 proposed rule relied on that definition, that EPA did not change the definition in promulgating the final rule in July 1992, and therefore that EPA was not free to change its interpretation without undertaking further rulemaking. Many comments also pointed out that EPA's

August 1994 proposal to include minor NSR in the scope of title I modifications would have the effect of greatly reducing, and in some cases virtually eliminating, the relief that Congress sought to provide sources under section 502(b)(10) (i.e., to avoid permit revisions for changes that do not increase allowable emissions and are not title I modifications).

Most small changes at sources, if they are subject to any Act requirements, are subject to minor NSR. Conversely, if they are not subject to minor NSR, they are generally not subject to any other Act requirements. Since changes that are not subject to any Act requirement and not otherwise barred by the permit may be made without revising the permit, limiting the scope of section 502(b)(10) to changes that are not subject to either minor or major NSR or section 112(g) would limit the relief provided by that section to a relatively small number of changes in most States. Only changes below the threshold for minor NSR set by the State would be eligible as a section 502(b)(10) change. In States with extensive minor NSR programs (e.g., those with low thresholds or those where any increase in emissions is considered a modification and therefore subject to minor NSR), virtually no changes would be eligible for section 502(b)(10) treatment. Depending on the State, interpreting title I modifications to include minor NSR would thus mean that few if any source changes could be accomplished under section 502(b)(10), and would thereby frustrate Congress's intent in enacting section 502(b)(10) to minimize the need for a permit revision.

Many commenters to the August 1994 proposal suggested that in using the phrase ''a modification under any provision'' of title I Congress was referring to those modifications which title I itself defines, generally by means of an emissions level above which specified control requirements apply. Parts C and D of title I and section 112(g) all specifically define the term ''modification'' for purposes of those provisions. By contrast, section 110(a)(2)(C), the basis for State minor NSR programs, does not define the term ''modification.'' What constitutes a modification for minor NSR purposes is a matter for each State to decide in fashioning its minor NSR program, and under the statute and applicable regulations, States have broad authority to determine the scope of their minor NSR programs. Many commenters contended that Congress, by limiting the scope of section 502(b)(10) to changes that are not title I modifications, intended to establish size thresholds for those changes that could be made using the flexibility afforded by that section and that the intended size thresholds are those contained in the provisions of title I itself.

The EPA believes that the term title I modification should be read in the context of section 502(b)(10) as *not* including minor NSR. While the statutory term, ''modifications under any provision of title I,'' is arguably broad on its face, giving the term its broadest meaning would largely (and in the case of some States, almost entirely) frustrate Congress' clear intent that sources be afforded flexibility under States' title V programs to make some changes that do not require a permit revision. As commenters noted, virtually no changes would be eligible for section 502(b)(10) treatment in States with extensive minor NSR programs if EPA adopted the broadest interpretation.

The House Report on the Clean Air Act Amendments of 1990 indicates that the drafters of title V were interested in establishing minimum criteria for State programs to afford some measure of national uniformity in title V permitting. H.R. Report 101–490, 103 Cong., 1st Sess., p 343. Those minimum criteria are spelled out in section 502(b), including in section 502(b)(10). In light of the legislative history, EPA believes that it would be inappropriate to define the title I modification limitation on the flexibility afforded by section 502(b)(10) in a way that could and does vary widely, depending on the scope of a State's minor NSR program. The obvious sizing purpose of the title I modification limitation also strongly suggests that Congress had in mind the thresholds it established elsewhere in title I, not the thresholds that States are free to set in fashioning their minor NSR programs.

To interpret the title I modification limitation to include minor NSR might also have the counterproductive effect of creating an incentive for States to scale back the scope of their minor NSR programs. If title I modification were interpreted to include minor NSR, States interested in allowing their sources to take more advantage of the flexibility offered by section 502(b)(10) might find it necessary to narrow the scope of their minor NSR programs (e.g., set higher threshold levels) so that more changes would escape being classified a title I modification. But the 1990 Amendments to the Act are Congress' testament that more, not less, needs to be done to clean up the nation's air. States with extensive minor NSR programs are generally those States which face the stiffest challenge in meeting and maintaining national air quality standards. It would be counterproductive if States were pressured to cut back their air pollution control programs for new or modified sources to take advantage of title V permitting flexibility when those programs are needed more than ever to achieve clean air.

As previously noted, the issue of the proper interpretation of the term title I modification is also relevant to the scope of the current rule's minor permit modification provisions. Those provisions allow any change that meets specified criteria, including *not* being ''a modification under any provision of title I,'' to be incorporated into a title V permit using streamlined procedures which do not include an opportunity for public participation. In the case of these provisions, the title I modification criterion is not derived from the statute but was promulgated by EPA as a means of sizing changes eligible for minor permit modification procedures. Here, too, the phrase used by the Agency to describe the limitation is broad on its face. However, EPA acknowledges that it effectively characterized the scope of that term in its explanation in the May 1991 proposed rulemaking preamble and that States and sources have relied on that explanation. The Agency thus believes that the term should be interpreted in that manner for purposes of the current rule.

Today's notice is a proposal, and EPA thus intends to codify in regulatory language the interpretation of title I modification described above at the same time it takes final action on the other issues it is addressing in this and the August 29th proposal to revise the part 70 rule. As indicated above, the Agency believes that the term title I modification as it appears in section 502(b)(10) and the current rule should be read to exclude changes subject to minor NSR. Consequently, EPA intends to promulgate the regulatory language defining title I modification as proposed in the August 1994 **Federal Register**, except that the definition *would not* include the reference to section 110(a)(2) of the Act.

H. EPA Issuance of PSD Permits

Under today's proposal, the permitting authority would be required to revise immediately the part 70 permit upon issuance of a PSD permit to accomplish the streamlining intended for changes with prior process. In States that do not have a PSD program approved into the SIP, however, the previous discussion regarding the automatic incorporation into part 70 permits of changes with State review

requires clarification in States without approved PSD programs, several situations are possible: (1) EPA issues the PSD permit as the issuing agency, (2) EPA signs the PSD permit in a PSD program partially delegated to the State, or (3) the State issues the permit acting as EPA's agent under a fully delegated, but not SIP-approved, PSD program.

A State with an approved part 70 program should always be able to enforce a PSD permit that is attached to a part 70 permit (even if the EPA issues the PSD permit). Where the PSD permit does not meet the requirements of part 70, the State may need to create a separate part 70 permit revision (EPA cannot revise the part 70 permit because it is not the part 70 permitting authority) to supply the terms necessary to meet the requirements of §§ 70.6(a) and (c). Other applicable requirements (e.g., MACT standards) that apply to the source but that are not included in the PSD permit would need to be included as well in the part 70 permit revision. Close coordination between the State and EPA could allow the part 70 permit revision and the PSD permit to be issued using the same public and EPA review process, if that is desired. Once the PSD permit is issued by EPA and the supplemental part 70 revision is completed by the State, the State would automatically incorporate both the PSD permit and the part 70 permit revision into the existing part 70 permit by attaching them to the existing part 70 permit.

In the case where the State permitting authority must also issue its own preconstruction approval under minor NSR (e.g., to cover additional pollutants and/or requirements) before construction of a PSD source or modification can proceed, the permitting authority would have to develop any additional part 70 permit terms to meet part 70 and place these into the minor NSR permit. Most often, the minor NSR permit should also contain the provisions of the part 70 revision (previously described). Upon issuance, the State NSR permit could be automatically incorporated along with any independent PSD permit into the existing part 70 permit although the incorporation of these documents does not necessarily have to occur simultaneously.

The Agency solicits comment on this approach to accomplishing streamlined permit revisions for incorporation of PSD permits. In particular, EPA solicits comment on whether permitting authorities which do not have adequate authority to issue PSD permits directly should be afforded additional time to incorporate those permits satisfactorily into relevant part 70 permits.

I. Rulemaking Under Section 302(j)

The current definition of major source in part 70 requires sources to count fugitive emissions in determining major source status for PSD and nonattainment NSR purposes when the source category is subject to a standard promulgated under section 111 or 112 of the Act, regardless of when the standard was established. As discussed in the August 1994 proposal notice, EPA agrees that it did not follow the procedural steps necessary under section 302(j) to expand the scope of source categories in the current part 70 regulations for which fugitives must be counted in making NSR major source determinations (59 FR 44514). In that notice, EPA proposed to change paragraph (2)(xxvii) of the definition of major source such that only a source belonging to a source category subject to a section 111 or 112 standard promulgated as of August 7, 1980 would be required to count fugitive emissions of the pollutant regulated by that standard in determining if it were major for NSR purposes. The EPA no longer believes that revising this category as was proposed is the appropriate approach. Rather, EPA believes that this paragraph needs to be revised to allow for future affirmative actions under section 302(j) to avoid the need for subsequent revisions to State part 70 programs and to be consistent with the NSR program.

In a notice of proposed rulemaking to revise NSR regulations implementing parts C and D of title I of the Act that will be published in the near future, the Agency will solicit comment on amending the listed source categories for which fugitive emissions must be counted in determining whether a source is major. This rulemaking action is being taken to satisfy the requirements of section 302(j) which requires that fugitive emissions be included in major source determinations only ''. . . as determined by rule by the Administrator.''

Under EPA's longstanding interpretation, section 302(j) involves a two-step rulemaking process. The EPA will propose to list a source category if emissions from that category have a potential for significant air quality deterioration, and will make a final listing unless commenters demonstrate that the social and economic costs of regulation would be unreasonable in comparison to the benefits (see e.g., 49 FR 43202, 43208 (1984)). The EPA's interpretation has been upheld on judicial review (*NRDC* v. *EPA*, 937 F.2d 641, 643 (D.C. Cir. 1991)).

Because EPA will be undertaking the future section 302(j) rulemaking, EPA no longer believes that it would be appropriate for parts 70 and 71 to definitely refer to the August 7, 1980 date provided in the August 1994 part 70 proposal and the April 1995 part 71 proposal. Until EPA promulgates this future section 302(j) rulemaking, EPA believes that fugitives should not be counted for source categories subject to section 111 or 112 standards promulgated after August 7, 1980. Consequently, to facilitate ongoing consistency with whatever affirmative section 302(j) determination the Administrator has made at any point in time, EPA proposes to revise parts 70 and 71 to require that fugitive emissions be included for source categories subject to standards promulgated under sections 111 or 112 for which the Administrator has made an affirmative determination under section 302(j).

The result of this approach would be that source categories currently subject to section 111 or 112 standards promulgated after August 7, 1980 would not have to count fugitives unless and until EPA completes this section 302(j) rulemaking to require that fugitives for these source categories be counted. Moreover, once this section 302(j) rulemaking has been completed, this approach would result in fugitive emissions from any source categories listed through a section 302(j) determination being counted for purposes of the title V definition of major source as well.

Finally, when new section 111 or 112 standards are promulgated and contain affirmative section 302(j) determinations, those determinations would carry over for purposes of title V. This approach would ultimately avoid any need to revise parts 70 and 71 every time a new section 302(j) rulemaking is conducted and would relieve State and local agencies from having to submit revised part 70 programs for EPA approval solely because the Administrator has made an affirmative section 302(j) determination. The EPA solicits comment on this approach.

In addition, EPA is proposing to delete the language in paragraph (2)(xxvii) of the major source definition in the current part 70 regulations, the August 1994 part 70 proposal, and the April 1995 part 71 proposal which reads: ''. . . but only with respect to those air pollutants that have been regulated for that category; . . .'' The EPA believes that this revision is necessary to make the parts 70 and 71 definitions of major source consistent

with the definitions of major source in parts 51 and 52. While the corresponding language in the NSR rules would require that sources in these categories consider fugitive emissions of all air pollutants in determining whether they are major, the current part 70 regulations, the August 1994 part 70 proposal, and the April 1995 part 71 proposal would exclude emissions not directly regulated by the 111 or 112 standard for that category. This could result in sources being major for purposes of NSR, but not being major for purposes of title V. This is inconsistent with the section 501(2) definition of major source which requires any stationary source to be considered major under title V if it is a major source under section 112 or a major stationary source under section 302 or part D of title I.

Finally, EPA proposes to modify paragraph (2)(viii) of the major source definition in the current part 70 regulations, the August 1994 part 70 proposal, and the April 1995 part 71 proposal which reads: ''Municipal incinerators capable of charging more than 250 tons of refuse per day; . . .'' This paragraph needs to be modified to read: ''Municipal incinerators (or combinations thereof) capable of charging more than 50 tons of refuse per day; . . .'' This correction needs to be made to be consistent with the NSPS for incinerators promulgated at § 60.50 in 1977 and which applies to incinerators with a charge rate of more than 50 tons per day. This proposed revision is also consistent with the list of major stationary sources in section 169(1) of the Act.

The EPA proposes to clarify that, for municipal incinerators, the capacity threshold for tons of refuse fired per day is for the combination of all municipal incinerator units at a source. For example, a municipal incinerator source which has two incinerator units, each unit capable of firing 40 tons of refuse per day, has a total firing capability at the source of 80 tons of refuse per day, which is more than the 50 tons per day capacity threshold.

J. Revisions to Section 51.161

Several States have asked whether the public participation requirements for minor NSR as codified at §§ 51.160–161 would also meet the title V public participation requirements set forth in today's proposal. For the reasons subsequently described, EPA believes that they would. Today's proposed part 70 permit revision procedures are intended to meet the requirements of section 502(b)(6) of the Act that such procedures be adequate, streamlined, and reasonable. The proposal presumes that the public participation process required for specified types of minor NSR changes by the regulations governing those changes is sufficient for title V purposes as well.

Application of public participation procedures to new and modified sources under minor NSR programs must be consistent with the statutory and regulatory purposes of those programs, and EPA believes that tailoring this application to the environmental significance of new or modified sources on a categorical or individual basis is consistent with these purposes. To demonstrate this, the purposes of minor NSR programs are set forth below, followed by a discussion of the tailoring issue.

Section 110(a)(2)(C) of the Act requires every SIP to ''include a program for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved.'' The EPA's regulations now codified at §§ 51.160–164 have since the early 1970s required a NSR program, and one is included in every SIP. This requirement predates and is separate from the requirement also set forth in section 110(a)(2)(C) (as well as §§ 165(a)(1) and 172(a)(5)) that States have ''major'' NSR permitting programs under part C (PSD) and part D (nonattainment NSR) of title I.

In their early years, the original NSR programs served primarily as a means to insure that new source growth would be consistent with maintenance of the NAAQS. In response to a lawsuit challenging the adequacy of the original round of SIP's approved by EPA in 1972, EPA determined that the original NSR program and other SIP measures were inadequate to maintain air quality. Consequently, EPA expanded the NSR regulations in 1973 to require public participation and to require that States explain the basis for any exemptions from the program (38 FR 15834, 15836 (1973) (citing *NRDC* v. *EPA*, No. 72–1522 (D.C. Cir.)); 38 FR 6279 (1973)). The 1973 regulations are substantively unchanged today. They do not on their face distinguish between major and minor sources, nor did the Clean Air Act prior to 1977.

With the adoption in the 1977 Amendments of parts C and D applicable to ''major'' new and modified sources, Congress created significant economic incentives for sources to take steps to be classified as minor and therefore avoid these more stringent major source requirements. Consequently, after 1977, a principal focus of States' pre-existing (now referred to as ''minor'') NSR programs became the use of limitations on hours of operation and rates of production, short-term emission limits, and (following the decision in *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979)) pollution control equipment that restricted sources' potential to emit to levels below applicable major source thresholds. Different terms are used to describe the various forms that these restrictions can take.[15] Since by definition a major new or modified source that fails to undergo NSR under part C or D would threaten the achievement of air quality goals, a ''necessary'' purpose of minor NSR programs that are used as a federally-enforceable mechanism to avoid major status is that they function in a way that reasonably assures that synthetic minor sources and netting transactions will in fact restrict potential to emit to minor source levels.

Section 51.160(e) requires States in their NSR programs to identify types and sizes of facilities, buildings, structures, or installations which will be subject to preconstruction review, and requires the State to discuss in its SIP submission the basis for that determination of the program scope. States may exempt from minor NSR those changes that are not environmentally significant, consistent with the de minimis exemption criteria set forth in *Alabama Power.* Given their environmental significance, however, EPA believes that it is unlikely that synthetic minor sources and netting transactions could qualify as de minimis changes. Since States may exempt de minimis changes from minor NSR altogether, it follows that they may provide a partial or full exemption from the full public process requirements of § 51.160(e), consistent with the environmental significance of the change.

As previously explained, the statutory purposes of section 502(b)(6) are met

[15] The term ''synthetic minor'' is generally used to describe such restrictions taken at a new source or at a new or modified emissions unit at an existing source to avoid major source status. ''Net out'' is the term used at a modified source when the restrictions are adopted at a unit or units other than the one(s) undertaking the change(s) that trigger the applicability review such that emissions reductions at the restricted units offset emissions increases at the new or modified units and the net emissions increase remains below the levels at which PSD or major NSR applies. A ''plantwide applicability limit'' or ''PAL'' is a form of net out whereby a range of future changes at a source is determined beforehand not to result in a net emissions increase, such that these changes may occur without triggering major NSR requirements if they are otherwise consistent with the requirements of section 110(a)(2)(C).

with respect to changes reviewed by State programs governed by Federal regulations by compliance with the procedural requirements set forth in those regulations. For minor NSR, that means compliance with the regulations at §§ 51.160–161. For the reasons stated above, EPA believes that the NSR regulations allow the tailoring of public participation process as envisioned by today's proposal for less environmentally significant changes, consistent with de minimis exemption criteria. Thus, procedural requirements for less environmentally significant changes can be the same for minor NSR *and* part 70 programs, allowing their consolidation. Of course, tailoring of process under either program must be reasonable and adequate for the purpose of the program.

To codify these understandings, EPA proposes to revise § 51.161 to reserve its current 30-day public notice and comment requirements for any construction or modification that is subject to major NSR or section 112(g) and for any minor NSR action (including establishment of a PAL) that would allow a part 70 source to net out of major NSR. A new paragraph (c) consistent with § 70.7(e)(2)(vi) is proposed at § 51.161 to clarify that, for other minor NSR transactions at part 70 sources, the permitting authority may match the public participation process to the environmental significance of the changes.

As discussed earlier in this notice, certain minor NSR actions are more environmentally significant because they allow a part 70 source to net-out of major NSR controls. They thus warrant a 30-day prior opportunity for public comment. Other minor NSR actions create synthetic minor sources or modifications which also have the effect of shielding the source or modification from major NSR controls. Actions creating synthetic minors can be environmentally significant, and States must consider the factors discussed earlier in identifying those types of synthetic minors that present greater risks of potentially allowing emission increases in excess of major source or modification thresholds. For these actions, a substantial opportunity for prior public participation is warranted. Other types of synthetic minors may be relatively less significant and a lesser degree of public participation would be acceptable. The permitting authority may also designate certain categories of changes, subject to EPA approval, as de minimis based upon its determination approved by EPA that meets the test prescribed by the *Alabama power* case. For these categories of changes, the State may forego altogether prior review by the public and EPA.

Paragraph (d) of § 51.161 is proposed to require availability of the public notice, rather than copies, to be provided to EPA and affected States. This change is intended to allow the permitting authority the opportunity to provide the required information through other avenues such as computer bulletin boards instead of solely by hard copy.

A new § 51.161(e) would be added to confirm that a State could, as needed to meet the public participation requirements for minor NSR changes at part 70 sources, either revise its NSR or part 70 program to include those provisions.

In addition, today's proposal would delete an obsolete grandfathering provision at § 51.161(c) applicable in limited circumstances. It enabled States to adopt a comment period shorter than would otherwise be required to be consistent with requirements in State programs for acting on requests for permission to construct. That provision was adopted in 1973 to avoid undue disruption to existing State programs. The EPA is not aware of any State program that currently falls within the scope of the grandfathering provision. Beyond that, given the changed purposes of minor NSR programs since that time and the flexibility under today's proposal to enable States to match public process with environmental significance, including the use of public comment periods less than 30 days where appropriate, EPA believes it is no longer necessary or appropriate to retain this grandfathering provision.

Finally, a new § 51.160(e) clarifies that all of the terms used in §§ 51.160–164 have the same meaning as provided elsewhere in subpart I of part 51, or in the Act. None of the terms in these sections have meanings different from those used in other sections of the NSR regulations or in the Act, and it is simpler to clarify this through a single cross-referencing provision rather than to repeat those terms here.

K. Incorporation of MACT Standards

The EPA proposed in the August 1994 notice to allow States to incorporate MACT standards into operating permits using a 2-step process. The first step provided for administrative incorporation of certain conditions into the permit at the time a source submits the initial notification that it is subject to the MACT standard. These conditions would outline the steps which the source would take to demonstrate compliance with the MACT standard. In the case of newly issued MACT standards, this first step would be in lieu of the reopening procedures otherwise applicable, which require full public and EPA review. The second step would require use of the proposed minor permit revision procedures to define final compliance parameter limits and unit applicability decisions, unless the source chose options such as emissions averaging, in which case significant permit revision procedures would be required.

Today's proposal would provide an analogous system but would afford States more discretion in providing adequate process for the second step of MACT incorporation. The first step of incorporating the MACT compliance plan could occur upon the permitting authority's receipt of a notice from the source that the source is subject to the MACT standard. The second step of defining source-specific compliance details would occur through the permit revision process for changes that do not undergo a State review program. As described previously, States would have broad discretion to determine the process for such changes which do not meet the proposed definition of more environmentally significant changes. The EPA is proposing *not* to include decisions regarding MACT compliance terms in the more environmentally significant category; States would thus have flexibility in providing process for these determinations in conjunction with State review programs, if the State so desires.

At the same time, as the author of MACT standards, EPA is in a particularly good position to judge the extent to which it would be appropriate to provide for public participation in decisionmaking about particular MACT compliance terms. The Agency thus expects to provide guidance to States in this regard, probably in the context of promulgating the MACT standards themselves. As a general matter, though, States should provide more public process for decisions regarding MACT compliance terms that entail the exercise of substantial discretion or judgment by the permitting authority or that could have a large impact on allowable emissions. Emissions averaging customized to the source, for example, should be subject to a substantial opportunity for prior public review.

It should be noted that not all MACT standards will require a two-step process for incorporating them into part 70 permits. As explained earlier in this notice, for MACT standards whose application does not vary from source to source in any significant way, the State

may provide for incorporation without any permitting authority or public review.

If EPA adopts this proposed approach in the final part 70 rule, States will be faced with a transition period during which State rules adopted pursuant to the current EPA rule require reopening using the same process as required for issuance of the initial permit. At this same time, the State would be in the process of developing and submitting for EPA approval a revision to their part 70 program responding to the revised EPA rule which would allow for a more streamlined process. Some States have requested EPA to allow States to use the more streamlined 2-step process for incorporating MACT standards during this transition period.

In response, EPA solicits comment on whether permits could be issued containing standard conditions pertaining to specific MACT standards in such a way as to avoid the first step of reopening. Under this approach, a permit issued prior to promulgation of a MACT standard would contain the conditions which outline the steps a source must take to demonstrate compliance (i.e., step one conditions) with the MACT standard promulgated subsequently. That is, analogous to the first of the two steps proposed on August 29, 1994 for incorporating MACT standards, the requisite compliance schedule would be initially established in the permit.

The EPA recognizes that for this approach to work, a minimum amount of information would need to be known at the time of permit issuance. Enough information would need to be known to satisfy the requirements of § 70.7(e)(5) of the August 1994 proposal. Those requirements include a statement of whether the section 112 requirement is an applicable requirement, a schedule of compliance, a requirement to submit reports required under the standard, and a requirement to apply for a subsequent permit revision by the deadline for the compliance statement under the MACT standard. To the extent these permit conditions can be expressed as standard conditions (e.g., ''compliance shall be achieved no later than 3 years after promulgation of the section 112 standard''), this approach may eliminate the need to revise the permit before the second step in the proposed MACT incorporation process. The EPA solicits comments, especially from States, as to whether such an approach would be effective in addressing their transition concerns and how it could best be implemented. In addition, the Agency solicits comment on the legal ability for States to issue such standard conditions before undergoing a rule adoption and/or delegation process to acquire any necessary additional legal authority.

L. Clarification for Section 112(r)

On March 13, 1995, EPA published a supplemental proposal on the requirements of section 112(r) of the Act, including how these requirements would be implemented in title V permits. In part, the proposal set forth standard part 70 permit conditions concerning the development and implementation of the risk management plan required under section 112(r)(7). The EPA indicated in the March 13 notice that permits issued with such conditions would satisfy the part 70 requirement to ''assure compliance'' with all applicable requirements.

During development of that proposal, several States commented that EPA should propose a narrower definition of the term ''applicable requirement'' in part 70. This suggestion was intended to reduce potential liabilities of permitting authorities and sources that might result from a more expansive reading of part 70 to require more with respect to permit content than that required under proposed 40 CFR part 68 to implement section 112(r).

In considering these comments, EPA recognizes the need to clarify part 70 to limit the potential for reading in unintended requirements. The Agency therefore proposes to add a paragraph (iv) to § 70.6(a)(1), which would state: ''(W)ith respect to applicable requirements under section 112(r)(7) of the Act, the inclusion of permit conditions in accordance with regulations promulgated under section 112(r) shall satisfy the requirements of paragraph (a)(1) of this section.'' This would clarify that permits containing the standard permit conditions that EPA expects to promulgate under part 68 would be considered in compliance with the requirements of § 70.6(a)(1), and that no other obligations on the source or the permitting authority with respect to requirements of 112(r) are to be implied from this language of part 70.

The August 1994 proposal responded to various concerns over the relevance of section 112(r) to the part 70 program by proposing a change to § 70.3(a). That proposal would have provided that a source would be exempted from the requirement to obtain a part 70 permit if it would be classified as major solely on the basis of its emissions of a section 112(r) pollutant. Based on the public comment and further analysis of this issue, EPA is today proposing a revision to the definition of ''regulated air pollutant'' contained in § 70.2 that deletes being listed pursuant to section 112(r) as a criterion for conferring the status of regulated air pollutant. This action should be more effective in meeting the goals of the proposal, while being more consistent with the general applicability structure of title V.

Because of its central role in Act implementation, the title V program addresses a wide range of air pollutants regulated by the programs within the Act. For example, in rewriting section 112, the 1990 Act amendments assign the title V permit program a key implementation role. Accordingly, the definition of regulated air pollutant, which governs some core program functions such as which pollutant emissions are addressed by the permit application, is an important one. With these goals in mind, EPA promulgated a definition of regulated air pollutant that encompassed all pollutants regulated under section 112, including substances listed pursuant to section 112(r).

The section 112(r) program governs the prevention of accidental releases, and had no predecessor in the Act. Although this program does not expressly apply to the routine emissions of air pollutants, EPA elected not to prejudge its relevance to air quality management issues. Accordingly, EPA promulgated a definition of regulated air pollutant that included the substances listed pursuant to section 112(r)(3). It should be noted that section 112(r)(3), in mandating that EPA develop this list of substances, specified several compounds for inclusion on this list. Most of these substances are pollutants that could be of concern to air quality management programs at some time and several of them are also classified as HAPs pursuant to section 112(b).

Since that time, EPA has proceeded with developing the section 112(r) program requirements, such as the risk management plan provisions of section 112(r)(7). The EPA has also promulgated a considerable list of substances pursuant to section 112(r)(3), including the explosive substances listed by the Department of Transportation as Division 1.1 in 49 CFR 172.101. Although this list includes a wide range of substances, some of which might eventually be addressed by air pollution control requirements, the list contains many other substances. Examples of the latter group include dynamite and nuclear warheads; substances of obvious interest to the risk management program, but equally obviously not an aspect of air quality management programs. The development of the section 112(r) risk management program confirms that the focus of this program is not the regulation of ''emissions'' of

''air pollutants'' and that its requirements, although important to public safety, are not significantly relevant to the broader issues of air quality management.

Some significant benefits arise from today's action. Because the section 112(r) pollutants at issue are generally not subject to air pollution control program requirements, there is only limited expertise available for evaluating their emissions from industrial facilities. Several parties have expressed concern that it would be quite difficult, technically, for businesses to meet the part 70 requirement that permit applicants describe their emissions of the section 112(r) pollutants. As a result of today's proposal, permit applicants would no longer be required to consider the broad class of substances listed pursuant to section 112(r) in preparing their emissions estimations. It should also be noted that this action is consistent with the section 112(r)(7)(f) provision that sources not be made subject to the requirement to apply for a part 70 permit solely because they are subject to section 112(r).

The following points should be understood in implementing this provision. First, it must be stressed that this action would solely address how part 70 requirements are implemented; it would in no way affect section 112(r) program provisions or the fact that section 112(r) is an applicable requirement of the Act for part 70 purposes. Second, because today's action means that the listing of a substance pursuant to section 112(r) would no longer have any relevance to the definition of regulated air pollutant, it should be clear that the *inclusion* of a pollutant on the section 112(r) list in no way affects the status of a pollutant that is classified as a regulated air pollutant because of its regulation pursuant to other programs. Finally, today's action does not affect the approvability or continuing adequacy of State part 70 permit fee programs.

M. Solicitation of Input

The Agency solicits comment on all aspects of today's proposal to accomplish permit revisions in a streamlined and more efficient manner. It is also interested in receiving comment on the final structure of the regulatory revisions and how they might be improved and/or how States might develop substantially equivalent provisions.

III. Part 70 Program Revisions

Title V and the current rule require States and local agencies to submit operating permit programs for EPA approval by November 15, 1993. This deadline has not changed and is not affected by the Agency's proposals to revise part 70. Most States and local agencies have submitted programs for approval, and EPA has proposed or taken final action on many of them. Until EPA promulgates final part 70 revisions, State program development and EPA approval will continue to be governed by the current rule. States that have yet to submit a program or receive program approval should thus be aware that their programs will be judged against the current rule until the revised rule is in place. As EPA explained in the August 1994 proposal, the Agency intends to provide a transition period following the promulgation of the part 70 revisions during which States may choose which rule EPA is to apply in reviewing the State program, the originally promulgated rule or the rule as revised.

Once EPA promulgates final part 70 revisions, States that receive program approval under the originally promulgated rule will be required to revise their programs as needed to comply with the revised rule. Under the current rule, States have at least 180 days from EPA's promulgation to make conforming changes to their programs or as much as 2 years if State legislation is needed to authorize the changes. At the same time, many State programs are being approved on an interim basis under the current rule. Title V and the current rule authorize EPA to grant a State program interim approval if it largely, but not entirely, meets the requirements for full approval. Under the statute and rule, however, States receiving interim approval must revise their programs as needed in time to gain full approval within 2 years of receiving interim approval. Consequently, States that receive interim approval may be faced with having to undertake two rounds of program revisions, the first to gain full approval and the second to comply with a revised part 70.

Depending on when it receives interim approval and when EPA promulgates final part 70 revisions, a State may be able to revise its program by means of a single rulemaking in the time frames allowed by the current rule. The Agency is very concerned, however, that the timing of these events for many and even most States will not be so fortuitous, consigning States to multiple rounds of rulemaking. More generally, EPA wants to minimize the potential disruption to State programs that rule revisions cause. The Agency is thus proposing to provide more time for States to submit program revisions. The Agency is also interested in extending the time period under which States may operate programs that have received interim approval to enable all States to revise their part 70 programs once instead of twice.

As noted above, the current rule calls for State program revisions in response to EPA rule revisions within specified time frames that vary according to whether State legislation is required. The Agency then has up to 1 year to approve States' submissions. The August 1994 notice proposed to revise § 70.4(i) of the current rule to specify that States would have 12 months to revise their programs if regulatory changes were needed. It further proposed to allow the Administrator to vary the time period provided for State program revisions as the Administrator deemed appropriate (proposed § 70.4(i)(1)(iv)).

The Agency is today proposing to exercise its discretion under proposed § 70.4(i)(1)(iv) to provide States 2 years to submit program revisions in response to the proposed part 70 revisions, regardless of whether State regulatory or legislative changes are required. The Agency believes this would be an appropriate exercise of its discretion in light of the fact that these part 70 revisions will be promulgated in the beginning years of most State part 70 programs. In these early years, the demands on States will be particularly heavy. The statute and regulations require States to complete the task of issuing permits to all sources subject to the program within 3 years of program approval. At the same time, States will have to address the many implementation issues that invariably arise when a new program is inaugurated. In light of the challenges States already face, EPA believes it is only fair and appropriate to provide them with 2 full years to submit program revisions.

The Agency further recognizes the possibility that some States may find it difficult to make all of the changes required by the part 70 revisions within the 2-year time period. In particular, today's proposal calls for States to rely on State preconstruction permitting programs to provide public review and certain permit content provisions for purposes of part 70. To the extent that these State review programs require supplementation to account for title V process and permit content requirements, EPA would allow States to revise either their part 70 regulations or the regulations governing their underlying programs. The Agency is aware, however, that supplementing the process of existing State programs may

pose additional implementation issues. To minimize any disruption of underlying State programs EPA is proposing to amend the current rule at § 70.4(d)(3)(iv) to allow the Agency to grant interim approval to State program submittals even if they do not meet the public participation requirements of the revised rule with respect to changes processed pursuant to State review programs.

States receiving interim approval would have an additional 2 years to make the changes needed to gain full EPA approval of their programs. In total, States would have up to 5 years from promulgation of the final part 70 revisions to put in place any additional procedures in conjunction with State review programs as needed to gain full approval of their part 70 programs (i.e., 2 years to submit program revisions sufficient to gain interim approval, 1 year for EPA to grant interim approval, and 2 years to gain full approval).

As previously noted, many States will have received interim approval of their part 70 programs under the current rule by the time these revisions are promulgated. The EPA is concerned about the potentially adverse effects of the part 70 revisions on these States, particularly those which submitted their part 70 programs by, or close to, the statutory submittal date (November 15, 1993) and therefore received the earliest interim approvals for their programs. Under the current rule, States granted interim approval for their programs must submit program revisions necessary to receive full approval at least 6 months prior to expiration of the interim approval. Under section 502(g), an interim approval can be granted for a period not to exceed 2 years and cannot be extended.

States which received the earliest interim approval may have less than 1 year after promulgation of the final part 70 revisions to develop and submit combined program revisions addressing both the deficiencies which caused interim approval as well as EPA's revisions to part 70. Many States have indicated that it would be extremely burdensome to undertake multiple program revisions, especially where legislative action would be necessary. Moreover, States might well be compelled to do multiple corrections for the same area of deficiency, once to correct the problem for which they received interim approval under the current part 70 and again to correct it in accordance with the revisions to part 70. This would be a seemingly pointless diversion of resources which are otherwise critically needed to issue permits under the approved program in such States. In addition, it would be confusing to permitting authorities, sources, and others involved in the implementation of the part 70 program to deal with ''moving targets.''

One approach for providing relief would be to require States to correct program deficiencies identified in the interim approval under the current part 70 only in those areas which are not proposed to be revised. That is, EPA would not require program revisions in areas of deficiency affected by the part 70 revisions, but would require them on the timeframe provided to respond to the part 70 revisions. This would provide relief by reducing the scope of the corrective actions needed by the State in response to EPA's interim approval actions. The relief, however, would be only partial to the extent that there are significant program deficiencies that are not affected by the part 70 revisions.

Instead, EPA believes that States with early interim approvals should be allowed more time to submit program correction revisions needed to receive full approval, regardless of what program provisions were determined to be deficient in the interim approval notice. That is, these States should be allowed to delay the submittal of any program revisions to address program deficiencies previously listed in their notice of interim approval until the deadline to submit other changes required by the proposed revisions to part 70. To accommodate this extension of the period to submit program revisions to address interim approval deficiencies, the duration of the interim approval granted to these States should be extended as necessary.

The Agency believes that such a policy is necessary to avoid penalizing those States which submitted their part 70 program on a more timely basis, while rewarding States with late submittals who would have considerably more time to synchronize their future program revisions. In light of the inequities which would result, the Agency believes that providing such a transition period is appropriate. The Agency solicits comment on the appropriate legal basis for granting such relief.

IV. Proposal for the Federal Operating Permits Program

A. Overview

In today's notice, EPA proposes a new system for part 71 for revising permits which is modeled after the system proposed today for part 70 permit revisions. This action is intended to supplement the April 27, 1995 proposal on part 71 regulations in this regard. Although proposed regulations to implement the new system have not been developed, EPA proposes to promulgate regulations to finalize the part 71 rulemaking that are consistent with the concepts and procedures discussed in today's proposal. The Agency believes that the subsequent discussion in today's preamble describes the new system with sufficient detail to allow the public to understand and offer informed comments on the proposal.

To the extent possible, EPA intends to model part 71 permit revision procedures after those proposed for part 70 to ensure that sources are not faced with substantially different programs when EPA, as opposed to a State, is the permitting authority. Since most part 71 programs are likely to be of limited duration, consistency with part 70 will enable smooth transition between Federal and State programs, encourage States to take delegation of administration of part 71 programs, help States that have not obtained part 70 approval to phase into the title V program, promote uniformity in public and affected State participation, and provide greater certainty and consistency for sources.

Following proposed part 70, today's part 71 proposal would establish two basic categories of changes for permit revision purposes. The first category would include all changes that are subject to State review programs established pursuant to the Act which review the change for title V purposes as well. Qualifying changes would be automatically incorporated into a title V permit (i.e., a part 70 or part 71 permit, as applicable) under a part 71 program upon completion of that review. The second category would include all other changes that are not subject to State review programs, and today's proposal describes a part 71 permit review process for these changes.

B. Changes Subject to State Review Programs

Applicability. As in the case of the part 70 program, today's proposal notice for revising part 71 permits builds on existing State review programs to provide for automatic incorporation into part 71 permits for all changes subject to the State review program which are also evaluated for title V purposes in this review. There are two criteria for a change to qualify. The first is that the State permitting authority must have reviewed the change and provided an adequate opportunity for public participation and affected State and EPA review commensurate with the

environmental significance of the change (see footnote number 1). For the more environmentally significant changes as defined under proposed part 70 (i.e., major NSR, 112(g), and net-outs) a 30-day prior public comment period and a 45-day opportunity for EPA review and objection must be required in the State review process for it to qualify. If a State review program did not provide a 30-day public review period or an adequate EPA review opportunity for these changes, EPA (or the delegate agency) would provide them as needed in a part 71 process as the part 71 permitting authority before issuing the part 71 permit.

Under part 70, EPA would give a State discretion, for the less environmentally significant changes, to match the amount of public review to the environmental significance of the change. Under today's proposal for part 71, EPA would accept the amount and timing of public process under the State's current NSR program, at least during the first 5 years following the effective date of a part 71 program in a State. The EPA expects no part 71 programs for States to last for more than this time duration. This approach is consistent with EPA's approach for reviewing minor NSR programs set forth in today's part 70 proposal. Under part 70, a State would be given interim approval even if its program did not meet the public participation requirements of the proposed part 70 for changes subject to State review programs (see section III of today's preamble).

The second criterion for inclusion in the first category requires that the change subject to the State review process would need to address the permit content requirements of proposed § 71.6. The EPA believes that many of these requirements could be included in the original title V permit as boilerplate or standard conditions, and would not require much additional effort to address part 71 permit content requirements for subsequent permit revisions. For example, the existing title V permit would already contain requirements regarding permit fees, periodic reporting, annual certification, and inspection and entry. If the existing title V permit ensures that these boilerplate conditions apply to the requirements attached to the permit (e.g., the revised NSR permit or 112(g) determination), it would not be necessary to revisit these requirements when the title V permit is revised.

Consistent with these criteria, the first category of changes would include changes that are subject to major or minor NSR or regulations implementing section 112(g) and changes that entail a source-specific revision of the SIP.

The Agency is also proposing that certain changes subject to a State review program could qualify even though they do not receive prior permitting authority review and approval. Under some State minor NSR programs, for examle, not all changes subject to minor NSR requirements get case-by-case State review and approval. Instead, some types of changes are subject to general rules, and the source may make such a change without prior State approval so long as it complies with the applicable requirements (i.e., the general rules). These changes would still be included in the first category.

As set forth under proposed § 70.7(e)(2)(viii), EPA is proposing that such requirements, when triggered by a change that is subject to specified requirements, but is *not* required to receive affirmative State approval under the State's review program, be included in the first category (i.e., changes subject to a State review program) for part 71 purposes and get the benefit of an automatic incorporation process (see Section II. C. of this preamble). Eligible requirements would be those that do not conflict with the existing title V permit, do not require interpretation as to applicability, and do not require creation of source-specific permit terms or conditions. These would include general rules or general permits. The justification for automatic incorporation of these types of requirements is the same as under part 70 (i.e., their application is so straightforward that little is to be gained from additional process).

Any change which was subject to a State review process which was inadequate from a title V standpoint must be processed as a minor or significant permit revision (see discussion below), depending on the environmental significance of the change. More environmentally significant changes require the significant permit revision process while less environmentally significant changes could be processed as minor permit revisions. The Agency, however, is concerned that parts of the prior State review process in some circumstances might unnecessarily be repeated under such an approach and solicits comment on how the part 71 permit revision process might be authorized to add only the elements missing from the State review process, rather than repeat all the elements of the prior State review process.

Automatic Incorporation Process. All changes that are subject to a qualifying State review program (except for those qualifying under a general rule approach), the part 71 permitting authority (either EPA or the delegate agency) would automatically incorporate the change into the title V permit immediately on completion of the State review process. The source could operate the change upon completion of the State review process and the automatic incorporation. As proposed today for part 70, EPA would similarly waive for part 71 purposes its objection opportunity for less environmentally significant changes subject to State review programs for at least 5 years.

To accomplish the permit revision, the permitting authority would not generate a new permit but would attach the document from the State review process, such as the revised NSR permit or the 112(g) MACT determination, to the existing title V permit. This process could be used provided all of the applicable requirements triggered by the change were addressed in the document attached to the permit.

For part 71, the permitting authority would use the same procedure for incorporating the results of the State review process into the title V permit as States would use under today's proposal for part 70. Since a new title V permit would not be issued under this process, the permitting authority would prepare an errata sheet identifying which terms of the title V permit were being replaced by which terms of the State permit or which terms were being removed as no longer relevant.

Where the change involved adding new applicable requirements to the title V permit, but did not require changing existing terms or conditions of the permit, the permit revision would be accomplished by attaching to a source's title V permit a copy of the State preconstruction permit or section 112(g) determination or the documentation containing the new requirement and permit terms that reflect the change.

Process for Incorporating Changes Subject to General Rules. As in the case of proposed part 70, for changes regulated by a State review program through a general rule, the source would submit a notice describing the change and the applicable requirements that attach as a result of the change. As part of the notice, the source would have to certify that it could operate the change without violating any existing permit terms and supply any additional permit terms required by title V (i.e., periodic reporting requirements). The title V permit would be revised and the source could operate the change upon submitting the notice.

C. Changes Not Subject to State Review Programs

Under today's proposal, the second basic category of changes for permit revision purposes includes all changes not subject to adequate State review programs.

Notice-and-Go. Part 71 would follow part 70 in proposing that changes that render a source subject to a newly applicable requirement but that are not subject to a State review program could be incorporated into the title V permit by means of a notice submitted by the permittee, provided that the change would not conflict with existing permit terms and no source-specific determination would need to be made in applying the requirement to the source. The justification for automatic incorporation of such revisions is the same as for part 70. The new applicable requirements to which these changes are subject should not require any interpretation regarding the applicability of the new requirements, or any case-by-case determination of source-specific permit terms or conditions. When EPA implements a part 71 program in a State, it will work with the State to determine which requirements for which changes can qualify for the notice-and-go procedure. For each such State, EPA will publish an informational notice that communicates to the regulated community and the general public the outcome of the EPA/State discussions. During implementation of the part 71 program, as States would do for part 70, EPA would provide quarterly notification to the public of such permit revisions and would provide a file accessible to the public containing information about the revisions.

In light of the general eligibility criteria described above, the EPA expects that many types of changes could be eligible for incorporation into the title V permit by means of a notice. Applicability of most NSPS and national emission standards for hazardous air pollutants (NESHAP) requirements, such as the application of a numerical emission limit to a boiler, would be straightforward and thus would be eligible. Many straightforward SIP requirements, such as source category-specific RACT requirements, would be eligible. Generically applicable requirements (e.g., those that apply identically to all units at a source such as opacity limits), would also be eligible for incorporation via this process, although a permit revision may not be necessary at all to apply such a requirement if such requirements are already addressed in the source's permit and apply prospectively to all future changes that would be subject to the requirement. The EPA may also determine that certain MACT standards are eligible for this process if they do not require the establishment of source-specific requirements (e.g., emissions averaging or setting of compliance parameters). Incorporation of MACT compliance schedules would also be eligible.

Finally, as provided in part 70, part 71 would provide that the source may operate the change upon mailing a notice, provided that the change can be operated in compliance with the existing title V permit. In the notice, the source would describe the change, describe any new permit terms needed to assure compliance with all applicable requirements and relevant part 71 requirements, and certify that the change is eligible for this process. The title V permit would be revised upon mailing of the notice to EPA.

Similarly, EPA would adopt provisions like that in proposed §§ 70.7(f)(2)(v)(A)(*1*)–(*5*) and (B). Thus, part 71 would provide that the source may operate certain administrative changes upon mailing a notice, provided that the change can be operated in compliance with the existing title V permit. These changes described in proposed §§ 70.7(f)(2)(v)(A)(*1*)–(*5*) include correcting typographical errors, allowing for certain changes in ownership or operational control of a source, and making minor administrative changes. The proposed procedures of § 70.7(f)(2)(v)(B) would also be used in part 71 allowing either the permitting authority or the source to revise the title V permit by issuing a notice.

Significant Permit Revisions. Changes not subject to State review programs and that are more environmentally significant as defined under § 70.7(f)(1) of today's part 70 proposal would be processed as significant permit revisions. The significant permit revision process would also be used if a more environmentally significant change subject to a State review program was not eligible for automatic incorporation (i.e., the change had not previously been subject to an adequate opportunity for public comment and a public hearing, affected State review, and EPA review or the part 71 permit content requirements had not been adequately addressed by a State review program).

The significant permit revision process would utilize the same procedures as required for initial permit issuance, i.e., an opportunity for public comment and a public hearing, review by affected States, and review by EPA (for delegated programs). Under part 71, a majority of these significant permit revisions would be completed within 6 months. The EPA expects that if the change had undergone a State review process that provided adequate input from the public, affected States, and EPA with respect to preconstruction requirements, but the preconstruction permit failed to appropriately address part 71 content requirements, then the permitting authority could in several instances process the part 71 permit revision in a much shorter timeframe than 6 months.

Part 71 Process for Other Less Environmentally Significant Changes. The EPA is not today proposing any specific part 71 permit revision process for less environmentally significant changes (as defined in today's proposed part 70) which do not qualify for notice-and-go treatment. The types of changes which represent this group are defined in proposed § 70.7(f)(1)(ii). With the possible exception of intra-monitoring approach changes, EPA does not expect the number of changes from this group to be significant, particularly in light of frequent options to combine such changes (see following discussion). The Agency, however, does solicit comment on the need to provide for a more expeditious permit revision procedure than the significant permit revision process to address less environmentally significant changes which do not qualify for notice-and-go or automatic incorporation. Where commenters do believe such a need exists, EPA solicits their suggestions for designing any appropriate change to the proposed permit revision system for part 71.

D. Combination Changes

''Combination changes'' under part 71 would be handled the same way as EPA proposes to handle them for part 70 (see proposed § 70.7(f)(3)). The general rule would be that a combination change can be processed using the process for automatic incorporation of changes subject to State review programs, provided the change receives any necessary public, affected State, and EPA review in the State review process and address all part 71 permit content requirements. For example, where an emissions increase is subject to minor NSR, but the source also wants to incorporate a PAL into the title V permit, the change could be automatically incorporated into the title V permit after undergoing review under the State's minor NSR program, provided the State review process meets the procedural requirements applicable

to the establishment of a PAL (i.e., a 30-day opportunity for prior public, affected State, and EPA review). This review may be provided on a permit-by-permit basis. In addition, where a State takes delegation of a part 71 program, it could process minor NSR changes and section 112(g) or (j) actions as combination changes. The Agency believes this is appropriate because upon delegation of a part 71 program, delegate States should also be able to receive delegation to implement sections 112(g) and (j), provided they have adequate authority under State law to do so.

E. Opportunity for EPA to Object and Permit Shield

The opportunity for EPA review of proposed title V permit revisions and the corresponding availability of the permit shield will vary with the part 71 permit revision procedure employed and will partially depend on whether EPA or the State is the part 71 permitting authority. In general, the permit shield may be granted by the part 71 permitting authority if the permit revision is approved pursuant to a process which affords an adequate opportunity for public and affected State review and for EPA to object to the issuance of the permit revision. The scope of EPA's review where provided would be the same as under today's proposal for part 70, i.e., such review would extend to whether the appropriate procedures were followed with respect to the State review process determination or delegate agency permitting decision (including requirements for public participation opportunities), whether the decision is properly supported, and whether the terms of the permit are enforceable and consistent with all applicable requirements.

Delegated Programs. For changes not subject to an adequate State review program which must be processed as either significant or minor permit revisions, EPA proposes to continue the requirement in § 71.10 of the April 27, 1995 notice that EPA be given a 45-day opportunity to object before issuance of the part 71 permit revision. Since both the proposed significant permit revision and the minor permit revision procedures contain adequate public participation and EPA review requirements, EPA believes that the part 71 permitting authority may in such cases grant a permit shield to apply to the changes. On the other hand, changes which qualify for a ''notice and go'' process would not contain review procedures sufficient to warrant the availability of the permit shield prior to permit renewal, at which point adequate public and EPA review opportunities would be provided for such changes.

More environmentally significant changes which are subject to a State review program which reviews these changes for title V purposes as well could be awarded the permit shield upon their automatic incorporation into the title V permit. As previously mentioned, EPA and the public must have been provided their review opportunity to review the adequacy of the change (including adequacy for title V purposes) in the State review process. For less environmentally significant changes subject to a State review program, EPA would depart from its April 27, 1995 proposal and follow today's proposed revisions for part 70 by not including an EPA review and objection opportunity for at least the first 5 years of the part 71 program for a particular State. Consequently, no permit shield would be available for the automatic incorporation of these changes. However, the part 71 permitting authority could at the source's request process the change as a minor permit revision, thus subjecting the change to public and EPA review, in order to establish a shield.

Non-Delegated Programs. For all changes not subject to a State review program and therefore processed by EPA under the minor or significant permit revision procedures, the Agency would have the option of granting the permit shield. Again, changes subject to a notice and go process with its abbreviated review procedures would not afford EPA the opportunity to grant a permit shield.

For changes subject to an adequate State review program which also reviews the changes for title V purposes, the preceding discussion regarding the availability of the permit shield under delegated part 71 programs would also apply (i.e., the permit shield is available for more environmentally significant changes). Where granted, EPA would incorporate the permit shield upon the automatic incorporation of the State review document addressing the approved change.

The EPA solicits comment on whether the revision processes outlined above are adequate and generally compatible with proposed part 70 and existing State permit revision procedures.

F. Other Part 71 Changes

For purposes of the part 71 program, EPA proposes to follow the approach of today's proposal for part 70 with respect to the definition of major source. For example, part 71 would take the same approach as part 70 with respect to non-major R&D activities at major sources (see discussion in Section V. A. of this preamble). The EPA believes that it is important to use a consistent definition of ''major source'' to assure that R&D facilities are not faced with substantially different applicability requirements when EPA is the permitting authority. The EPA also proposes for part 71 that the definition of ''major source'' would require that fugitive emissions be included in determining major source applicability consistent with the definition proposed today for part 70.

Also for purposes of part 71, EPA proposes to provide an emergency defense for exceedances of technology-based limits established in title V permits as described in Section V. B. of this preamble, but does not intend to expand the concept of emergency defense to include start-up, shut-down, and preventive maintenance conditions. The EPA solicits comment on the proper scope of the affirmative defense provided by part 71. Also, EPA solicits comment on whether part 71 should authorize permitting authorities to grant a source temporary authorization to make a change without revising the permit, as needed to protect public health or welfare in emergencies, and whether part 71 should adopt the same approach as part 70 adopts regarding the scope, terms, and procedural safeguards for such authorization. Finally, EPA proposes to adopt for the part 71 program the standard certification language that is proposed for part 70 (discussed in Section V. C. of this preamble) to be used by responsible officials. The Agency believes that the same standard for preparing certifications should apply to the part 70 and part 71 programs.

With respect to the treatment of section 112(r) pollutants, part 71 would follow today's proposal for part 70. Accordingly, the definition of ''regulated air pollutant'' would be revised to delete the reference to section 112(r). Further, EPA would add a paragraph analogous to proposed § 70.6(a)(1)(iv) to clarify that part 71 permits containing the standard permit conditions that EPA expects to promulgate under part 68 would be considered in compliance with the requirement that permits contain terms that assure compliance with all applicable requirements. In addition, consistent with EPA's current interpretation of title I modification, (discussed at length in Section II. H. of this preamble), EPA intends to promulgate the definition of title I modification as proposed in the April 27, 1995 **Federal Register** except that the definition would not include the

reference to section 110(a)(2) of the Act. This would result in changes that are processed through State minor NSR programs being excluded from the definition.

Also, EPA proposes that part 71 follow today's proposal for part 70 with respect to EPA's interpretation of section 502(b)(10) of the Act, as discussed in Section II. G. of this preamble. Thus, all permitting authorities, including EPA under part 71 programs, would be subject to the same requirement to issue permits containing emissions caps under which sources could trade certain emissions increases and decreases without seeking permit revisions, consistent with applicable requirements. Therefore, EPA proposes to incorporate the changes proposed today to § 70.4(b)(12)(i) into the corresponding section of part 71 on operational flexibility, proposed § 71.6(p)(1). The EPA further proposes to adopt definitions for part 71 that are consistent with the definitions contained in proposed § 70.2 with respect to the following terms: Advance NSR, alternative scenarios, emissions cap permit, plantwide applicability limit, and State review program.

In addition, EPA today proposes three changes to EPA's prior proposal relating to permit fees under the part 71 program. First, EPA proposes that delegation agreements be required to include a condition that the delegate agency have sufficient resources to administer the part 71 program. Initially, EPA believed that it would be required to provide funds to delegate agencies to enable them to carry out the responsibilities outlined in the delegation agreements. This remains the case in many States, and for those States, the delegation agreement would acknowledge that EPA would impose fees on permitted sources sufficient to cover program costs. However, EPA has become aware that there are several States that have authority under existing State law to charge permit fees that EPA believes may be sufficient to fund a part 71 program. In the context of delegating part 71 administration to any specific State, EPA intends to assess the adequacy of the State's existing fee authority to determine whether it is sufficient to cover costs of running a part 71 program. If the delegate agency has adequate fee revenue from sources subject to title V to fund a fully-delegated part 71 program, EPA would grant delegation and would thereafter incur no program costs. However, EPA's decision to delegate and its assessment of the State's fee authority would in no way constitute EPA approval of the State's fee structure for purposes of part 70, or in any way prejudge EPA's evaluation of a State's submitted part 70 program. To provide sources in such States with relief from part 71 fee requirements, EPA proposes to revise § 71.9(c)(2) to provide that when EPA has fully delegated a part 71 program to a State that had adequate fee authority to receive delegation and EPA incurs no program costs to administer the program, sources would not be subject to the fee requirements of part 71. In situations where sources are already paying fees to the delegate agency that are adequate to fund the part 71 program, EPA believes that it would be inequitable to require sources to pay fees to EPA as well.

When a State seeks delegation of only a portion of the part 71 program, sources would not be relieved from the part 71 fee requirements because EPA would incur some costs in administering the portion of the program that was not delegated. In such a case, EPA would determine whether the fee structures provided in proposed §§ 71.9(c)(1)–(4) would reflect the costs of administering the part 71 program. If not, EPA would need to set appropriate fees through a separate rulemaking, as per proposed § 71.9(c)(7).

Second, the EPA proposes to eliminate the $3 per ton surcharge for delegated and contractor administered programs from the fee formula in proposed § 71.9(c)(3) because EPA believes that for purposes of title V permit fees, the cost of EPA's oversight of State-administered programs should be treated the same regardless of whether the program has been delegated under part 71 or approved under part 70. The EPA's oversight costs of State part 70 programs are not covered by State permit fees and are not passed along to industry. The part 71 rule as proposed today would treat EPA oversight costs in delegated part 71 and approved part 70 programs consistently. For similar reasons, the cost of preparing guidance for the part 71 program would be deleted from the list of activities that comprise ''program costs'' in proposed § 71.9(b).

Third, EPA proposes to reduce the per ton fee amount in proposed § 71.9(c)(1) and § 71.9(c)(3) from $45 to $38, to reflect EPA's lower program costs resulting from the streamlined permit revision procedures proposed today. The data supporting the lower estimate of program costs are contained in a document entitled ''Supplement to the Federal Operating Permits Program Fees and Cost Analysis'' which is contained in the docket for this rulemaking.

The EPA solicits comments on whether the approach taken in the fee provisions proposed today is appropriate and would result in adequate revenue being generated to offset program costs, and whether, in general, the fee provisions of proposed part 71 could be structured in a manner that more closely reflects the true costs of administering the part 71 program.

V. Other Changes and Clarifications

A. Rationale for Proposed Exemption for Non-Major R&D Activities

The Agency is today clarifying the reasoning behind its July 21, 1992 preamble discussion regarding R&D activities, and is proposing changes to the definition of ''major source'' in part 70 that better reflect this intent. As explained below, States have flexibility under part 70 regarding whether to consider R&D operations as part of the source with which it is sited for purposes of determining whether a major source is present.

The part 70 major source definition requires aggregation of ''all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control).'' Following NSR/PSD precedent, EPA chose the major (2-digit) Standard Industrial Classification (SIC) code categories established by the U.S. Department of Commerce to delineate an ''industrial grouping.''

In response to comments requesting exemption of R&D activities from title V, EPA stated in the preamble to the final part 70 rule that, ''in many cases States will have the flexibility to treat an R&D facility * * * as though it were a separate source, and [the R&D facility] would then be required to have a title V permit only if the R&D facility itself would be a major source'' (57 FR 32264 and 32269, July 21, 1992). Read consistently with the ''major source'' definition in the rule, however, this statement could be read as meaning that separate source treatment would occur only in situations where the R&D portion of a source has its own two-digit SIC code and is not a support facility.

In light of the uncertain meaning of the July 21, 1992 preamble statement, industry representatives have continued to express concerns over the permitting of R&D operations. The EPA recognizes that R&D operations typically entail the use of small quantities of chemicals[6]

[6] For example, a relatively very large R&D facility employing 3,000 people in a 2 million square foot complex was comprehensively tested for its air emissions. Approximately 40 stacks fed by 600 laboratories involving potentially over a thousand

manipulated and released in a highly variable manner, and that these attributes are present at R&D operations to a degree that distinguishes them from other source categories. The EPA further recognizes that, because of these unique combinations of attributes, bringing collocated non-major R&D facilities into part 70 permitting could potentially lead to difficult exercises in emissions estimating and tracking and impose additional monitoring and recordkeeping requirements (where the R&D operation is subject to an Act requirement).

In response to these continuing concerns, EPA is today offering a more detailed explanation of the SIC code approach as it affects R&D operations. In addition, EPA is proposing revisions to the part 70 major source definition to resolve any ambiguities that may derive from the SIC code manual, and to ensure that the same result obtains for purposes of section 112 if the changes to the major source definition proposed on August 29, 1994 are carried to finality. The EPA recognizes that parallel rule revisions would be required for part 63 (the section 112 General Provisions) and parts 51 and 52 (NSR and PSD). These other rules would be revised through a separate rulemaking action.

At the time of the July 1992 promulgation, EPA believed that R&D was not specifically addressed by the SIC code manual in any way. It would have followed that the question of whether and how R&D should be considered part of a source would be answered in light of the rules traditionally applied to determine the extent to which activities at a site are functionally integrated.

In general, to be considered a functional part of an industrial activity, a facility must contribute to that activity in a material, rather than merely conceptual, manner. The EPA believes that operations as proposed for definition in § 70.2 do not contribute to the product or service rendered at an industrial site in any relevant sense. By definition, the product of an R&D operation is information potentially useful to create a new industrial process or to improve the process ongoing at the facility, but not to directly support the process in which the industrial activity is currently engaged or capable of engaging in any significant commercial fashion. It follows that R&D would not be considered part of the industrial activity with which it is located, despite its location, and must therefore be treated as if it were a separate source belonging to a separate 2-digit SIC code.

Under the Agency's support facility test, even where neighboring, commonly controlled sources have different 2-digit SIC codes, they should be aggregated to determine whether a major source is present if the output of one is more than 50 per cent devoted to support of another. However, EPA believes that R&D operations should not generally be considered support facilities, since the ''support'' provided is directed towards development of new processes or products and not to current production.

The limits of this interpretation should be self-evident. To the extent an activity bears some resemblance to R&D but in fact contributes to the ongoing product produced or service rendered at a facility in a more than de minimis manner, those activities should be considered part of the source. Pilot plants often present instances of activities that are conducted on a trial basis, but which are nevertheless dedicated to producing a product for commerce to a more than de minimis extent, and so would not be considered R&D. The EPA has spoken directly to the types of processes that qualify as R&D in the context of certain section 112 MACT standards. These descriptive statements address the question of whether R&D should be included in particular MACT source categories, rather than major source applicability, and so are not relevant to the principles discussed in this notice.

Since the July 1992 promulgation, EPA has learned that the SIC code manual itself presents an obstacle to this interpretation, because it provides that R&D should generally be grouped with the four-digit code activity with which it is most closely associated. Because this contrasts with EPA's understanding at the time of promulgation of part 70, EPA believes it appropriate to continue to implement the current rule to allow for separate consideration of R&D as described above. At the same time, EPA is today proposing to revise the major source definition to clarify that R&D should be treated as having its own industrial grouping for purposes of the title I and section 302(j) elements of the major source definition.

A parallel rule revision is also being proposed for the section 112 element. This is because the August 1994 proposal would change the part 70 definition to conform to the section 112 General Provisions, which do not use the SIC code approach to source aggregation. Today's notice proposes to establish a narrow exception for R&D facilities. Because the major source definitions used under title V must be consistent with other Act programs, EPA plans to follow this revision to part 70 with conforming revisions to the major source definition in the section 112 General Provisions and other section 112 rules. In addition, a new definition for ''research and development activities'' is proposed for § 70.2.

The EPA's authority for this part 70 revision is the same as that which supported its adoption of the 2-digit SIC code limitation in parts C and D of title I and thus in title V. As EPA stated in its 1980 promulgation of PSD regulations, the 2-digit SIC code grouping embodies a common sense notion of a ''plant'' that is appropriate for the PSD program (45 FR 52694 (August 7, 1980)). For title I and section 302(j) purposes, the establishment of a separate industrial grouping for R&D simply represents a further refinement to that common sense approach.

The EPA chose not to adopt the SIC code approach in the section 112 context because it concluded that a definition that encompassed the entire contiguous commonly owned facility would be more consistent with the overall intent of section 112. However, the statutory language of section 112(a)(1), which refers to ''any stationary source or *group* of stationary sources'' (emphasis added), leaves EPA discretion to separate out discrete groups of stationary sources that are located together only for administrative convenience, rather than because they contribute to other activities at the site. That this same language appears in the various nonattainment ''major source'' definitions added by the 1990 Act Amendments, where EPA's historical practice has been to allow disaggregation by major industrial grouping, further supports this interpretation. The EPA now believes that a disaggregation of R&D operations makes sense in the context of section 112, as well as title I and thus in title V, because (1) they are operations which by definition could stand alone, but which are located with other sources primarily for administrative convenience, and (2) the inherent changeability of these operations.

The reasonableness of this separate treatment is further supported by section 112(c)(7), which states that, for section 112 purposes, ''the Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities.'' Although this provision addresses

operations were sampled for a 6 to 8 hour duration over a 2 day period. Results of subsequent analyses showed that even if this level of operation as tested were maintained day and night for an entire year the predicted actual emissions of all VOC compounds would be less than 12 tpy.

source categorization for promulgation of standards rather than applicability, it clearly evidences a concern that R&D operations not be grouped with other types of operations in a way that overlooks the particular challenges associated with their regulation.

The EPA wishes to emphasize that R&D operations present a unique case under section 112. As noted above, EPA, after studying the matter, has concluded that R&D is unique in terms of the variability and unpredictability of processes. Also, as previously discussed, R&D operations are inherently divorced from the primary activity at a facility. While other types of activities may or may not support the primary activity depending upon the configuration at a particular site, R&D activities categorically do not (except, as the definition would provide, in a de minimis manner).

Today's notice does not define the term ''de minimis'' as used in the definition of R&D. The EPA solicits comment on whether it should attempt to further define de minimis in the final rule, and if so, what criteria would be appropriate. For instance, de minimis might be defined in absolute terms, in terms of the amount of the R&D product that is offered to the industrial activity relative to the total product from the R&D operation, or in terms of the amount of support from the R&D operation relative to the magnitude of that activity.

The EPA also solicits comment on whether the special treatment afforded by this proposal should be extended to laboratory activities that are not R&D. The proposal would exclude such laboratory activities. The reasoning is that other laboratory activities fall outside of the rationale supporting special treatment, since they are likely to be more predictable in their operations and to be functionally integrated with on-site industrial activities. The Agency solicits comment on whether there are other categories of laboratory activities for which this is typically not the case.

As noted above, several States interpreted the July 1992 preamble discussion of R&D activities as authorizing the creation of a separate applicability category for R&D, apart from the 2-digit SIC code approach. Most of these provisions have been identified as grounds for interim approval. The EPA notes that while these programs aim for a similar result, they are not uniform in their specifics. For instance, definitions of R&D may differ from EPA's definition or may be absent altogether. For this reason, EPA is not today commenting on whether the clarification in today's notice merits a change in the approval status of any of these programs, but instead plans to address this on a case-by-case basis.

Notwithstanding the preceding approach which provides for separate treatment of the majority of R&D activities, two issues remain related to when such R&D activities would independently be considered to be major under part 70. Specifically, one issue concerns the effect of a facility that supports the R&D activity on the status of the R&D activity and the other issue concerns how the PTE for R&D activities is to be determined.

Industry has expressed concern about a stand-alone R&D activity (i.e., not located with a manufacturing facility) which is supported by another activity (e.g., a boiler) which on its own may exceed major source thresholds. This issue is not addressed by placing the R&D activity in a separate SIC category, which would only cause the R&D activity to be treated separately. The boiler would be considered part of the stand-alone R&D activity if it was functionally integrated with the R&D activity. The R&D activity together with the boiler would then be considered major. Industry has recommended that boilers and other support facilities not be considered part of an R&D activity.

The EPA recognizes that disparate treatment may result if an R&D activity at a major manufacturing facility would be considered separate and non-major, while another R&D activity of the same size standing alone would be considered a major source only because of its support facilities. The Agency, therefore, believes an R&D activity should be considered separate from major support facilities just as it would be separate from a major manufacturing source, and solicits comment on whether it should provide an exemption from major source determination rules in the case of facilities that support R&D activities. The EPA, however, recognizes the potential for this approach to apply in many other circumstances with a possible erosion of the concept of a source as the sum of functionally integrated parts, a result the Agency does not support. The Agency therefore suggests commenters provide rationale as to how the approach can be limited to R&D activities.

As noted, a source must calculate PTE from an R&D operation to determine whether it is major. In light of the previously mentioned difficulty of performing emission calculations, and the data gathered by EPA to date (discussed in footnote 6 above), which indicates that even large R&D facilities tend to have very low actual emissions, EPA considers it of little benefit to require R&D facilities to go through extensive efforts in calculating PTE. Permitting authorities will bear primary responsibility for determining the PTE of individual R&D facilities, and EPA intends to generally defer to these judgments. Given the small likelihood that any R&D operation will be major, EPA believes permitting authorities should accept methods of calculating PTE from R&D operations that are not unduly burdensome on the source.

Some have claimed that deriving a numerical PTE calculation from an R&D activity is simply not possible, because experiments are typically performed only once or a few times, meaning that past emissions are at best a poor indicator of the future. The EPA is unsure whether this renders PTE calculations strictly impossible, but acknowledges a high degree of difficulty. The EPA believes R&D may present a case suitable for a de minimis exception from the statutory requirement to calculate PTE, because emissions are so low as to yield a gain of trivial or no value compared to the difficulty associated with their measurement. Comment is solicited on whether such an exception would be appropriate, and more generally on the availability of cost-effective means of calculating PTE from R&D activities.

B. Emergency Defense

Section 70.6(g) sets forth the terms of an emergency defense that States may include in part 70 permits at their discretion. It is available for violations of technology-based emission limits that are unavoidably caused by ''any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God. . . .''

In the preamble to the final rule, EPA explained that it modeled the part 70 defense after the NPDES permit upset provision at 40 CFR 122.41. The NPDES provision was promulgated in response to several cases under the Clean Water Act (CWA) that held that EPA must provide an upset defense for technology-based effluent limits to take account of the fact that even properly operated technology can unexpectedly fail (*Marathon Oil* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977)). The Agency extended the reasoning of these cases to technology-based air pollution control standards in promulgating an emergency defense in part 70. At the same time, EPA noted that other courts had ruled that EPA was not required to provide such a defense but could instead rely on the exercise of

enforcement discretion to address violations caused by emergencies.

The part 70 emergency defense was challenged by State and local government, environmental group, and industry petitioners in *CAIP* v. *EPA*. The governmental and environmental petitioners were concerned that the rule required States to provide the defense, despite the existence of potentially different State defenses. They also questioned EPA's legal authority to promulgate an across-the-board defense for violations of limits that may have been set in a manner that took into account the possibility of emergencies or upsets. Industry, on the other hand, objected to the narrowness of the defense and urged that the defense be made available for violations that may occur as a result of plant start-up, shut-down, malfunction, or preventative maintenance. Some industry petitioners also urged EPA to make the defense available to violations of limits based in whole or in part on health protection.

At the outset, EPA wants to make clear that the part 70 rule does *not* require that States adopt the emergency defense. A State may include such a defense in its part 70 program to the extent it finds appropriate, although it may not adopt an emergency defense less stringent than that set forth at section 70.6(g). As noted above, the part 70 defense is modeled on the NPDES upset provision, which States may omit if they desire to establish a more stringent water pollution control program than federal law requires (40 CFR § 123.25(a)(12); *Sierra Club* v. *Union Oil Co. of California*, 813 F.2d 1480, 1484 (9th Cir. 1987)). Like the CWA, the Act in sections 116 and 506(a) authorizes States to establish additional or more stringent air pollution control or permitting requirements. Consistent with that, States may decide to provide an emergency defense that is narrower in scope or more stringent in application than § 70.6(g) or no defense at all. Consistent with § 70.11(b), States may also provide for any affirmative defense that would be available in an enforcement action brought pursuant to section 113 of the Act.

The Agency has reviewed the legal basis for the § 70.6(g) defense. As noted above, the relevant CWA case law is split. While *Marathon Oil* and several other courts have required EPA to provide an upset defense, either through a permit program or in the underlying substantive requirement, to address the fallibility of technology, other courts have not out of concern that such a defense was inconsistent with Congress' intent that technology-based effluent limits force technological development and that enforcement of such limits be ''swift and direct'' (*Corn Refiners Ass'n, Inc.* v. *Costle,* 594 F.2d 1223, 1226 (8th Cir. 1979), *Weyerhaeuser Co.* v. *Costle,* 590 F.2d 1011, 1057 (D.C. Cir. 1978)). Other courts have ruled that no upset provision is required or appropriate where EPA took the fallibility of technology into account in setting the technology-based standard for which an upset defense was sought (*CPC Int'l, Inc.* v. *Train,* 540 F.2d 1329, 1336–38 (8th Cir. 1976), *American Petroleum Inst.* v. *EPA*, 540 F.2d 1023, 1035–36 (10th Cir. 1976)). These cases counsel caution in the application of a uniform emergency defense to standards which were previously established under several different Act provisions. To determine the extent to which the part 70 defense may be appropriately applied, it is necessary to examine the basis and terms of the different Act technology-based standards to which it would apply.[7]

New source performance standards are established by EPA under section 111 of the Act based on the best system of emission reduction, considering costs and other relevant factors, that has been adequately demonstrated. The regulations that generally govern the implementation of NSPS provide that exceedances of NSPS during periods of start-up, shut-down, and malfunction are *not* violations of the applicable limit unless otherwise specified in the applicable standard[8] (§ 60.8(c)). In other words, sources are not obligated to meet NSPS when starting up, shutting down, or experiencing malfunctions except to the extent EPA has required otherwise in setting a particular NSPS. There is thus no need for an affirmative defense for exceedances that occur under those circumstances. The NSPS general provisions do not address the availability of a defense for violations caused by emergencies, as defined in part 70, and the Agency has relied on enforcement discretion to address such situations.

National emission standards for hazardous air pollutants were established by EPA under section 112 of the Act prior to the 1990 Act amendments. Section 112 prior to the 1990 amendments required EPA to set NESHAP at the level which provides an ample margin of safety to protect the public health from the HAP being regulated. In promulgating NESHAP, EPA did not provide for affirmative defenses, since the standards were formulated largely without regard to the limits of technology. The Agency did not extend the part 70 emergency defense to NESHAP for the same reason.

The 1990 amendments to the Act changed the basis for setting standards for HAPs. Section 112 now requires the Agency to promulgate standards for more than 180 HAPs based on the maximum achievable control technology, taking into account costs and other relevant factors. The Agency has promulgated general provisions governing implementation of the so-called MACT standards, and those provisions, like the NSPS general provisions, do not require sources to comply with MACT standards when starting up or shutting down or when malfunctions occur (40 CFR 63.6(f)). Like NSPS, there is thus no need for a defense for exceedances that occur under those circumstances. Again like the NSPS regulations, the MACT general provisions do not address the availability of a defense for violations of MACT standards that occur as a result of an emergency.

States also establish technology-based limits pursuant to their SIP's, including those set pursuant to major and minor NSR programs. Many States' SIP's provide an affirmative defense for violations of SIP technology-based limits. The EPA has approved these where consistent with its 1983 SIP policy. The terms of these defenses vary somewhat with the State, but they are generally available for violations that occur as a result of malfunctions, and, for certain types of limits, for start-up and shut-down as well. In any event, States may be presumed to set technology-based limits with any approved SIP defenses in mind.

The foregoing description of the Act's major technology-based standards raises several questions about the appropriateness and terms of any part 70 defense. First, since at least most of these standards provide either an exemption from compliance or an affirmative defense for exceedances caused by start-up, shut-down, and malfunction conditions, a part 70 defense covering these conditions would be largely redundant. Second, to the extent that some NSPS or MACT standards do *not* provide relief for these conditions, it is because EPA has made a decision not to provide it (in the case of health-based standards) or, in case of many technology-based limits, because

[7] By technology-based standards, EPA means those standards the stringency of which are based on determinations of what is technologically feasible, considering relevant factors. The fact that technology-based standards contribute to the attainment of the health-based NAAQS or help protect public health from toxic air pollutants does not change their character as technology-based standards.

[8] Certain NSPS, such as Part 60 Subpart D (electric utility steam generating units), apply during any period of operation.

EPA has taken account of the failures of technology in setting the numerical emissions limit. Similarly, to the extent a technology-based limit established by a State does *not* provide an affirmative defense for start-up, shut-down, or malfunctions, it may be because the State judged that such a defense was unnecessary or unwise. Under these circumstances, it would appear inappropriate for the Agency to allow a generic emergency defense because it could have the effect of decreasing the stringency of the previously established standard or undercutting a technology-forcing or enforcement strategy undertaken by the Agency or a State in establishing the standard.

As EPA has previously explained, the primary purpose of title V is to create for each covered source a permit that documents in one place all the Act requirements that apply to the source. Title V itself does not authorize changes to requirements established pursuant to other Act provisions. Section 504 requires that permits contain provisions as needed to assure the enforceability of the limits codified in the permit, but that does not authorize changes in the stringency of those limits. In keeping with the codification purpose of title V, EPA believes that its authority under title V to provide for affirmative defenses for violations of permit terms is limited. Where the rulemaking establishing a limit addresses the need for and terms of any affirmative defense, there is no basis for providing additional or different defenses under title V.

While the foregoing description of technology-based standards indicates there is little or no basis for providing a start-up, shut-down, preventative maintenance, or malfunction defense, the question still remains whether part 70 can and should provide an emergency defense. As noted above, the NSPS and MACT general provisions and apparently most SIP's do not provide an emergency defense *per se*. It is not entirely clear why that is the case. Most likely, prosecutorial discretion was considered an adequate and even preferable mechanism for addressing violations caused by emergencies. Several CWA cases also suggest that upset or emergency defenses could be unnecessary where standards were set taking into account the possibility of emergencies and could have the effect of slowing the development of technology or making enforcement slower and less sure.

The EPA is reluctant to retain a generally applicable emergency defense without completing further review of the appropriateness of such a defense for the different Federal technology-based standards in light of the concerns with such a defense raised in the CWA cases. A review of the bases for setting these standards is necessary to ensure that the standards do not already take into account the possibility of emergencies. Beyond that, EPA wants to further consider the consequences of such a defense on the different types of federal technology-based standards for technology-forcing and enforcement.

For similar reasons, EPA also is concerned about establishing a generic emergency defense that would apply to State-established limits. The appropriateness of providing a defense is best judged by a State in light of its standard-setting methodologies and environmental and enforcement goals. As currently provided in § 70.6(g)(5), the emergency defense is in addition to any defense provided for in an applicable requirement. This includes any defense appropriately provided for in a technology-based SIP limit. Beyond that, an EPA decision not to retain an emergency defense in part 70 would not preclude a State from adopting a defense in its SIP for technology-based SIP limits consistent with its standard-setting methodologies. The SIP-based defense could then be referenced in the State's part 70 permits as appropriate.

The EPA has not reached a firm conclusion on whether to limit the availability of the emergency defense to part 70-only provisions. The Agency solicits comment on whether such a limitation is appropriate in light of EPA's goal of providing States flexibility in implementing their part 70 programs. The EPA's final decision on this issue will be based on the record developed through this proposal.

It may nevertheless be appropriate for EPA to provide relief under title V authority for exceedances of technology-based limits uniquely established in part 70 permits. Part 70 permitting will be the forum for establishing limits pursuant to section 112(j) and 112(i)(5); alternative limits pursuant to § 70.6(a)(1)(iii), including any substitute section 112 standards set under a program approved by EPA under section 112(l); and limits to a source's potential to emit for purposes of avoiding otherwise applicable Act requirements. Of these, at least section 112(j) limits will, and alternative limits under § 70.6.(a)(l)(iii) and section 112(l) programs may, be technology-based. The EPA believes that in setting technology-based limits as part of title V permitting, States should have discretion to afford sources relief from exceedances that may occur as a result of start up, shut down, and malfunctions as appropriate in view of the state's standard-setting methodology.

The EPA is considering using the start-up, shut-down, malfunction provisions of the MACT general provisions as the model for a part 70 counterpart. As noted earlier, the MACT (and NSPS) general provisions provide that those standards need not be met during periods of start-up, shut-down, and malfunction, as opposed to providing a defense to violations of the standards under those conditions. While EPA does not believe an outright exemption such as this would be appropriate in part 70, the Agency solicits comment on whether part 70 should authorize States to provide an affirmative defense for compliance with part 70-only technology-based limits under start-up, shut-down, and malfunction conditions. The EPA believes it appropriate to condition the availability of such relief on the submittal of and adherence to a plan like that required in § 63.6(e)(3), establishing a protocol for the source during those periods.

The Agency also believes that States should have discretion to provide an emergency defense for violations of part 70-only technology-based limits similar to that set forth in the current rule. Suggestions have been made that the Agency adopt a definition of emergency identical to that of ''upset'' under the NPDES regulations (§ 122.41(n)). The Agency notes that the current rule's definition of emergency was drafted to avoid any implication that emergencies could include start-up, shut-down, and preventative maintenance conditions. Since EPA is considering addressing those conditions with an exemption from compliance as described above, it is inclined to retain the current rule's definition of ''emergency.'' The Agency solicits comment on the advantages and disadvantages of a uniform definition of upset or emergency across the water and air permitting programs.

Several States have also raised the question of whether part 70 should authorize permitting authorities to grant a source temporary authorization to make a change without revising permits as needed to protect public health or welfare in emergencies, such as natural disasters. The South Coast [California] Air Quality Management District (SCAQMD) has pointed out that local governments operating essential public services have had to respond to emergencies such as earthquakes, fires, and civil disturbances in ways that applicable permit terms might not have allowed. The State of New York has similarly noted instances when sources

have needed to make changes on short notice to respond to emergencies such as severe winter storms. Both jurisdictions have available as a matter of State law a mechanism for granting sources temporary authorizations to make changes without revising the source's permit under specified circumstances and in accordance with prescribed procedures. See SCAQMD's breakdown rule (Rule 430) and State law provisions regarding variances (Health & Saf. Code 42350–42364, particularly § 42352), and New York's regulations at Title 6, Section 621.12.

The Agency solicits comment on the need for a part 70 provision authorizing States to provide the kind of emergency authorizations described above. States could rely on the exercise of enforcement discretion to avoid penalizing sources for permit violations incurred as a result of State-sanctioned actions taken to safeguard the public from serious harm in times of emergencies. However, under title V and part 70, citizens may bring enforcement actions for violations of permit terms. While it would seem doubtful that anyone would seek to prosecute a violation caused by a source's actions to respond to a public health crisis, States and sources may well prefer that sources be relieved from the risk of liability under such circumstances.

The Agency also solicits comment on the proper scope and terms of any such authorization provision. The SCAQMD has limited its concerns to essential public services operated by local governments, while New York's regulations authorize changes at sources regardless of whether they are publicly or privately owned. For New York the only essential criterion is whether the change is needed to respond to an emergency, which its regulations define as ''an event which presents an immediate threat to life, health, property, or natural resources.'' New York's regulations also limit the duration of such authorizations to at most two 30-day terms.

Procedural safeguards are important to the exercise of any such authority. New York's regulations require prior notification of a change by the source requesting emergency authorization unless prior notification is not possible. The regulations also require that the State permitting authority, prior to issuing an emergency authority, make a finding of an emergency, stating why immediate action is needed and the consequences if the action is not immediately taken. The permitting authority must also determine that the change is being made in a manner that will cause the least change, modification, or adverse impact to life, health, property, or natural resources. The permitting authority is authorized to attach such conditions to the authorization as it deems appropriate. If the permitting authority finds that the change is no longer immediately necessary to protect life, health, property, or natural resources, it may issue an order requiring the source to immediately cease the action it has taken pursuant to the emergency authorization.

New York's regulations provide one potential model for a part 70 provision authorizing States to provide emergency authorizations. The extent of New York's procedural safeguards, however, may well be linked to the relatively broad scope of its emergency authorization, which, as noted earlier, extends to private as well as public sources and broadly defines emergency. More narrowly tailored emergency provisions would presumably require fewer procedural safeguards. The Agency requests that commenters addressing the proper scope of an emergency authorization also consider what procedural safeguards would be appropriate in light of the suggested scope. The Agency believes that providing after-the-fact public notification of changes made pursuant to an emergency authorization provision would be appropriate.

C. Certification Language

Section 70.5(d) of the current rule requires that any part 70 application form, report, or compliance certification contain a certification by a responsible official of the truth, accuracy, and completeness of the submission. It further requires that any certification required under part 70 state that, ''based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.'' The text of § 70.5(d) was adopted unchanged from the proposal. In the preamble to the proposed rule, EPA explained that the required statement regarding the truth, accuracy, and completeness of the submission was modeled after Rule 11 of the Federal Rules of Civil Procedure. Rule 11 provides that by presenting pleadings, motions, or other documents to Federal courts, a lawyer ''is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances'' that the documents are not presented for an improper purpose (e.g., to harass or cause delay); the claims made are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of established law or the establishment of new law; and that allegations or factual contentions have or are likely to have reasonable evidentiary support.

Among the issues raised by several State and local governments in their petitions for review of part 70 was the appropriateness of the certification language adopted by EPA. The governmental petitioners were concerned that EPA was requiring certification language different from that required by the National Pollutant Discharge Elimination System (NPDES) under the CWA. The NPDES regulations at § 122.22(d) require the following certification language:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

In light of the NPDES certification language, State and local government petitioners read the part 70 certification language as potentially establishing a less rigorous standard for the inquiries on which certifications were to be based, and they believed their reading was confirmed by EPA's reference to Rule 11 as the model for the part 70 language. Beyond that, they noted that the meaning of the NPDES language had been well established over the years of its use, and were concerned that the meaning of the different part 70 language would not be clear until it had been decided by the courts. The State and local petitioners therefore suggested that EPA revise its part 70 certification to be identical to the NPDES certification language.

The Agency agrees that Rule 11 is not an appropriate analog to the certification requirements of a permitting program. Rule 11 effectively requires lawyers to make a reasonable inquiry into the relevant facts and law so they may assess whether the claims or arguments they raise in court have a reasonable chance of success. Since courts' interpretation of the law can evolve as a result of a compelling factual case or argument, Rule 11 accords lawyers wide latitude in bringing cases. By contrast, an inquiry into the truth, accuracy, and completeness of a factual

submission should typically be a more straightforward exercise. The official signing the certification is being asked to take reasonable steps to ensure that what he or she signs is true, accurate, and complete, not whether it provides a sufficient basis for a court to decide a question of law in the official's favor. The Agency thus no longer believes that the part 70 certification language should be modeled on Rule 11.

In place of the current rule's certification language, EPA proposes to require the certification language found in the acid rain rule promulgated under title IV of the Act at 40 CFR 72.21(b)(2) and in the proposed enhanced monitoring rule at 58 FR 54689, col. 1 (proposed § 64.5(c)). Those provisions provide in relevant part:

> The responsible official shall certify, by his or her signature, the following statement: ''I certify under penalty of law that I above personally examined, and am familiar with, the statements and information submitted in this document and all of its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statement and information, including the possibility of fine or imprisonment.''

This language is modeled on the NPDES language quoted above, but does not expressly require that there be a system designed to assure that qualified personnel properly gather and evaluate the submitted information. The Agency believes it is not necessary to include that express requirement, since EPA expects that certifying officials will establish such systems where needed to assure the adequacy and reasonableness of their inquiry. In addition, there is an economy in requiring use of the same certification language in the three Act programs. As the State and local petitioners pointed out, differences in language imply differences in meaning. The Agency has no reason to think that a different standard for preparing certifications should apply to the part 70 program than applies in the acid rain program. It thus proposes to adopt for the part 70 program the language now found in the acid rain rule.

D. Provisions Related to Tribal Programs

On August 25, 1994 (59 FR 43956), EPA proposed regulations specifying those provisions of the Act for which it is appropriate to treat Indian Tribes as States. Therein (59 FR 43971–72) EPA described expectations for Tribal programs in implementing various aspects of the part 70 program and how they might differ from those expected for State part 70 programs. Today's proposal contains part 70 rule changes needed to conform part 70 to the August 25 proposal.

The reader should refer to the August 25, 1994 proposal for a more detailed description of the part 70 regulatory revisions proposed today to address Tribal programs (59 FR 43966–68, 43970–72, 43980–82). The EPA has received many comments on the August 25, 1994 proposed rules and EPA may make changes to the proposal that in turn necessitate conforming changes to the part 70 revisions proposed today. In today's action, EPA solicits comment on the limited issue of whether EPA has accurately proposed to implement the changes to part 70 previously described in the August 25, 1994 proposal. Comments addressing whether and how EPA should allow Indian Tribes to administer part 70 programs are outside the scope of today's action and should have been submitted in response to EPA's August 25, 1994 proposal.

VI. Administrative Requirements

A. Public Hearing

No public hearing will be held to discuss this supplemental proposal unless a hearing is requested in writing and sufficient reason for a hearing is included in the written request. The EPA has already engaged all interested groups in extensive public discussions on these topics and hopes to expedite the issuance of final regulatory revisions. If a public hearing is held, it will take place on the last day of the comment period. Persons wishing to attend a hearing, if held, should call (919) 541–5281 to determine if a hearing will be held and to obtain the time and location. Persons wishing to request a public hearing must submit a written request to EPA during the first 15 days of the comment period at the address given in the **ADDRESSES** section of this preamble.

B. Docket

The docket for this regulatory action pertaining to part 71 is A–93–50. For actions pertaining to part 71, the docket is A–93–51. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this proposed rulemaking. The principal purposes of the docket are: (1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the rulemaking process, and (2) to serve as the record in case of judicial review (except for interagency review materials) (307(d)(7)(A)). The dockets for today's notice are available for public inspection at EPA's Air Docket, which is listed under the **ADDRESSES** section of this notice.

C. Office of Management and Budget (OMB) Review

Under Executive Order 12866 (E.O. 12866) (58 FR 51735 (October 4, 1993)), section 4(c), EPA is required for significant regulatory actions to prepare an assessment of the potential costs and benefits (referred to as a Regulatory Impact Analysis (RIA)) of the regulatory action. Sections 3(f)(1–4) of E.O. 12866 define ''significant'' regulatory actions as those that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities,[9] or the principles set forth in E.O. 12866.

Pursuant to the terms of Executive Order 12866, OMB and EPA consider this and other actions related to part 70 and part 71 permit revisions a ''significant regulatory action'' within the meaning of the Executive Order. The EPA has submitted this supplemental rulemaking proposal to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record. Any written comments from OMB to EPA, and any EPA responses to those comments, will be included in Docket A–93–50 for part 70 changes and Docket A–93–51 for part 71 actions.

To facilitate OMB review of the August 1994 proposed rulemaking, EPA prepared an analysis showing the marginal impacts of the proposed revisions to part 70. That analysis would also bound the costs associated with the supplemental proposal

[9] These priorities include economic growth while maintaining environmental quality, provide opportunities for domestic and international competitiveness, mitigate the impact of regulations on the innovation and dissemination of environmental technologies, and empower minority and poor communities in accordance with the Administration's primary goal for environmental equity.

contained herein. As stated in the August 1994 notice, the Agency is also in the process of updating the current ICR for part 70 which will be a comprehensive analysis of the final revised part 70. A draft of that revised ICR is in docket A–93–50. As noted under the DATES section of this notice, there is a 60-day comment period for the draft ICR.

After review of the current RIA for part 70, (EPA–450/2–91–011), the Agency has determined that the effect of the changes to part 70 which would result from today's action will be less than both the current RIA and the estimate provided for the August 1994 proposal. The estimates of the savings beyond the costs projected for the August 1994 proposal and the current rule are provided in the unfunded mandates section (Section V. F.) of this preamble. The final estimate would ultimately depend in part on how States would use the additional flexibility provided to them in today's proposal. However, considerable savings will occur as the State merges its preconstruction review program to also meet part 70 requirements. This will allow subsequent permit revisions needed to incorporate such changes to occur administratively instead of through the more costly de minimis, minor, or even significant permit revision tracks described in the August 1994 proposal. Analogous processes will be used under a part 71 program. Savings will depend on its duration and how the Agency will work with States to implement any Federal permit program that is required.

D. Regulatory Flexibility Act Compliance

Under the Regulatory Flexibility Act, whenever an Agency publishes any proposed or final rule in the **Federal Register**, it must prepare a Regulatory Flexibility Analysis (RFA) that describes the impact of the rule on small entities (i.e., small businesses, organizations, and governmental jurisdictions).

The EPA has established guidelines which require an RFA to accompany a rulemaking package. For any rule subject to the Regulatory Flexibility Act, the Agency's new policy requires a regulatory flexibility analysis if the rule will have any economic impact, however small, on any small entities that are subject to the rule, even though the Agency may not be legally required to do so.

A regulatory flexibility screening analysis of the impacts of the original part 70 rules revealed that the original rule did not have a significant and disproportionate adverse impact on small entities. The resulting administrative costs of the August 1994 proposal and of today's supplemental proposal for both part 70 and part 71 affect larger part 70 sources which are not typically believed to be small business entities. Consequently, the Administrator certifies that the proposed revisions to part 70 and part 71 will not have a significant and disproportionate impact on small entities. The EPA, however, solicits any information or data which might affect these proposed certifications. The EPA will reexamine this issue and perform any subsequent analysis deemed necessary. Any subsequent analysis will be available in the respective dockets for part 70 and part 71 and will be taken into account before promulgation.

E. Paperwork Reduction Act

The ICR requirements for the part 70 regulations were submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The ICR was prepared by EPA in association with the promulgation of part 70 and a copy may be obtained from Sandy Farmer, Information Policy Branch (mail code 2136), U.S. Environmental Protection Agency, 401 M St. S.W., Washington D.C. 20460, (202) 260–2740.

The screening analysis for the revisions to part 70 indicates a need to revise the current burden estimate and, in addition, the current ICR is due to be updated since it was only for a period of 3 years after promulgation of part 70. However, EPA is preparing an ICR for the entire part 70 rule to reflect part 70 at the time the proposed revisions to part 70 are promulgated. This ICR will supersede or replace the update of the original part 70 ICR upon promulgation of the revisions to part 70. The draft ICR for the proposed part 71 rule will be amended as necessary upon promulgation of the part 71 rule. The draft ICR for the revised part 70 is in docket A–93–50 and subject to a 60-day comment period.

Send comments regarding the burden estimate in the draft ICR or any other aspect of this collection of information, including suggestions for reducing this burden by [60 DAYS AFTER PUBLICATION] to: Chief, Information Policy Branch (2136), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, marked ''Attention: Desk Officer for EPA.'' The final rule revisions will respond to any OMB or public comments on the information collection requirements contained in this proposal.

F. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act'') (signed into law on March 22, 1995) requires that the Agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

Section 203 of the Unfunded Mandates Act provides that if any small governments may be significantly or uniquely impacted by the rule, the agency must establish a plan for obtaining input from and informing, educating, and advising any such potentially affected small governments.

Under section 205 of the Unfunded Mandates Act, the Agency must identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a budgetary impact statement must be prepared. The Agency must select from those alternatives the least costly, most cost-effective, or least burdensome alternative for State, local, and tribal governments and the private sector, that achieves the objectives of the rule, unless the Agency explains why this alternative is not selected or unless the selection of this alternative is inconsistent with law.

The costs of implementing the system for revising operating permits in today's proposal were estimated to determine the burden on permitting authorities and industry of complying with the requirements. Since the regulatory revisions to part 70 would replace requirements now in place, however, the actual impact of promulgating today's proposed revisions should be viewed in terms of the difference in costs of implementing the current part 70 vs. the proposed requirements.

Costs were estimated in terms of the administrative burden on permitting authorities, EPA, and permitted sources. Administrative cost includes a range of costs which cover the source's preparing an application through EPA's and the permitting authority's effort to complete the process. The administrative costs of implementing today's proposed revisions to part 70 are estimated to be approximately $33 million per year. In comparison, EPA estimates the administrative costs associated with implementing the current part 70 permit revision system to be approximately $118 million per year in administrative burden. The actual impact of

implementing the proposed permit revision system in today's notice, therefore, represents a reduction in costs of 72 per cent over implementing the current part 70.

Today's proposal would reduce the overall explicit costs associated with the part 70 permitting program by 16 per cent from $526 million to $441 million annually. This reduction in explicit costs does not represent the complete universe of changes to the 1992 ICR. These changes, together with additional changes to the part 70 rule proposed in August 1994 and other more recent information received from the initial implementation of part 70, will be incorporated into the ICR update for part 70 due in October 1995.

The ICR for the proposed part 71 incorporated the basic approach proposed today for part 71 permit revisions. In this document EPA estimated that the total direct cost of part 71 implementation to the private sector would be no more than $72 million in any one year. The estimate of direct costs to industry includes the costs that are over and above costs industry would have incurred by complying with State operating permits programs mandated by the Act, for which part 71 programs are substitutes. The specific cost of permit revisions would be only a small percent of this amount.

The Agency concludes that since the proposed revisions to part 70 would result in reductions in costs over implementation of the current part 70, and since the proposal for part 71 would result in a total cost to industry of no more than $72 million in any one year, the requirement for a budgetary impact statement does not apply. As a result of extensive public comment on the August 1994 proposal, the Agency considered alternatives for a permit revision system and selected an approach that provides a streamlined and flexible system that is the most cost-effective and least burdensome while continuing to meet the requirements of title V. Because small governments will not be significantly or uniquely affected by this rule, other than to reduce costs of operating permit programs they have opted to administer, the Agency is not required to develop a plan with regard to small governments.

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations.

40 CFR Parts 70 and 71

Air pollution control, Prevention of significant deterioration, New source review, Fugitive emissions, Particulate matter, Volatile organic compounds, Nitrogen dioxide, Carbon monoxide, Hydrocarbons, Lead, Operating permits.

Dated: August 22, 1995.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

2. Section 51.160 is amended by adding a new paragraph (g) to read as follows:

§ 51.160 Legally enforceable procedures.

* * * * *

(g) All terms used in §§ 51.160 and 51.164 of this part shall have the same meaning as set forth elsewhere in relevant sections of subpart I of this part, or in the Act, as appropriate.

3. Section 51.161 is amended by adding the words ''an adequate'' between the words ''provide'' and ''opportunity'' in the first sentence of paragraph (a); by revising paragraphs (b), (c) and (d); and by adding a new paragraph (e) to read as follows:

§ 51.161 Public availability of information.

* * * * *

(b) The following requirements shall apply for purposes of paragraph (a) of this section.

(1) Opportunity for public comment as defined in paragraph (b)(2) of this section shall be provided for:

(i) The construction or modification of any stationary source that is subject to permitting requirements as a major source or major modification under part C or part D of title I; and

(ii) Any physical change or change in the method of operation of a part 70 source associated with a project where the prospective emissions increases from such changes, considered by themselves, would be a significant emissions increase of any pollutant subject to regulation under part C or D of the Act.

(2) The opportunity for public comment shall include, as a minimum:

(i) Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality;

(ii) A 30-day period for submittal of public comment; and

(iii) A notice in the affected area specifying the location of the relevant source information.

(c) For other construction or modification activities subject to this section, but not subject to paragraph (b) of this section, the program may vary the procedures for, and timing of, public review in light of the environmental significance of the activity. The permitting authority may designate, subject to EPA approval under this paragraph or in the State's part 70 program, certain categories of changes as being de minimis. For such de minimis changes, the State may forego altogether review by the public.

(d) Availability of the notice required by paragraph (b) of this section must also be provided to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located. The notice also must be provided to any other agency in the region having responsibility for implementing the procedures required under this subpart.

(e) Notwithstanding the preceding paragraphs in this section, for changes constituting modification activities at part 70 sources subject to § 51.160 of this part, the requirements of paragraph (a) of this section shall be considered to be met for the change if the part 70 permit for the source is subjected to revision procedures approved by EPA as meeting the public participation requirements of 40 CFR 70.7(e) for the change.

PART 70—STATE OPERATING PERMIT PROGRAMS

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

2. Section 70.2 is amended as follows:

a. Adding the words ''except that research and development activities shall be treated as belonging to a separate industrial grouping'' at the end of the last sentence in the first paragraph of the definition of ''Major source;''

b. Removing the definitions of ''Draft permit'', ''Part 70 program or State program'', ''Proposed Permit'', and adding definitions for ''Draft permit or draft permit revision'', ''Part 70 program, State program or program'',

''Proposed permit or proposed permit revision; revising paragraphs (1), (2)(viii), and (2)(xxvii) of the definition of ''Major source;'' and the introductory text of paragraph (5) of the definition of ''Regulated air pollutant;'' and

c. Adding definitions of ''Advance NSR,'' ''Alternative operating scenarios,'' ''Emissions Cap permit,'' ''Eligible Indian Tribe,'' ''Indian Tribe,'' ''Plantwide applicability limit (PAL),'' ''Research and development activities,'' ''State review program,'' and ''Title I modification'' in alphabetical order.

§ 70.2 Definitions.

* * * * *

Advance NSR means terms or conditions in a part 70 permit setting forth requirements applicable to new units or modifications under applicable major or minor NSR programs or regulations implementing section 112(g) of the Act, so that such changes may be operated without having to obtain a part 70 permit revision.

* * * * *

Alternative operating scenarios means terms or conditions in a part 70 permit which assure compliance with different modes of operation for which a different applicable requirement applies and for which the source is designed to accommodate.

* * * * *

Draft permit or draft permit revision means the version of the permit or permit revision for which the permitting authority offers public participation as provided under § 70.7 of this part.

* * * * *

Eligible Indian Tribe means an Indian Tribe that EPA has determined to meet the requirements of section 301(d)(2) of the Act or 40 CFR part 49. [NOTE 40 CFR part 49 are proposed regulations (59 FR 43956 (August 25, 1994))]

Emissions Cap permit means a part 70 permit that contains one or more federally-enforceable emissions limitations that meets the requirement for permit content contained in § 70.4(b)(12) of this part, including a PAL and/or an advance NSR condition.

* * * * *

Indian Tribe has the meaning defined in section 302(r) of the Act.

Major source * * *

(1) * * *

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutant (HAP) (including any fugitive emissions of such pollutant) which has been listed pursuant to section 112(b) of the Act, 25 tpy or more of any combination of such hazardous air pollutants (including any fugitive emissions of such pollutants), or such lesser quantity as the Administrator may establish by rule. Notwithstanding the preceding sentence:

(A) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; and

(B) Research and development activities may be considered separately for purposes of determining whether a major source is present, and need not be aggregated with collocated stationary sources unless the research and development activities contribute to the product produced or service rendered by the collocated sources in a more than de minimis manner; or

(ii) For radionuclides, ''major source'' shall have the meaning specified by the Administrator by rule.

(2) * * *

(viii) Municipal incinerators (or combinations thereof) capable of charging more than 50 tons of refuse per day;

* * * * *

(xxvii) Any other stationary source category regulated under section 111 or 112 of the Act and for which the Administrator has made an affirmative determination under section 302(j) of the Act.''

* * * * *

Part 70 program, State program, or *program* means a program approved by the Administrator under this part.

* * * * *

Plantwide applicability limit (PAL) means a federally-enforceable emissions limitation established for a source to limit its potential to emit for a particular pollutant to a level at or below which a particular applicable requirement would not apply.

* * * * *

Proposed permit or proposed permit revision means the version of a permit or permit revision that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with § 70.8 of this part.

* * * * *

Regulated air pollutant * * *

(5) Any pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Act, including sections 112(g) and (j) of the Act, including the following:

* * * * *

Research and development activities means activities conducted to test more efficient production processes or methods for preventing or reducing adverse environmental impacts, provided that the activities do not include the production of an intermediate or final product for sale or exchange for commercial profit, and activities conducted at a research or laboratory facility that is operated under the close supervision of technically trained personnel the primary purpose of which is to conduct research and development into new processes and products and that is not engaged in the manufacture of products for sale or exchange for commercial profit, except in a de minimis manner.

* * * * *

State review program means a program established under section 112(g) of the Act, parts C and D of the Act (i.e., major NSR), or section 110(a)(2)(C) of the Act (i.e., minor NSR) and any other State program approved by EPA as such. A State review program need not entail review and approval of all source changes subject to the program, but may regulate categories of source changes by means of general rules or general permits as appropriate.

* * * * *

Title I modification or modification under any provision of title I of the Act means any modification under parts C and D of title I or sections 111(a)(4), 112(a)(5), or 112(g) of the Act; under regulations promulgated by EPA thereunder or in § 61.07 of part 61 of this chapter; or under State regulations approved by EPA to meet such requirements.

* * * * *

3. Section 70.4 is amended us follows:

a. Revising the heading;

b. Adding introductory text after the heading;

c. Revising paragraphs (b) introductory text, (b)(3) introductory text, (b)(3)(x), (b)(6), (b)(11)(ii), (b)(12)(i), (d)(1), (d)(3)(iv), (e) introductory text, (e)(1), and (e)(2);

d. Adding a new paragraph (b)(3)(xiv);

e. Adding to the end of paragraph (a) the following sentence, ''Indian Tribes are not required to submit part 70 programs to EPA for approval, but may elect to do so.'';

f. Adding the phrase '', Tribal,'' after the words ''copies of all applicable State'' in the first sentence of paragraph (b)(2);

g. Adding the words ''or tribal'' after the words ''judicial review in State'' in the first and second sentences of paragraph (b)(3)(xi);

h. Adding the words ''Except for Tribal programs'' to the beginning of the first sentence in paragraph (b)(12);

i. Removing paragraphs (b)(12)(iii), (b)(14), and (b)(15); and

j. Redesignating paragraph (b)(16) as (b)(14).

§ 70.4 State and Tribal program submittals and transition.

Eligible Indian Tribes may administer programs meeting the requirements of this section. Unless otherwise indicated, references to ''States'' and ''Governors'' in this section shall include, as appropriate, ''Tribal programs,'' ''Indian Tribes,'' and ''Indian governing bodies.''

* * * * *

(b) *Elements of the initial program submission.*

Any State or Indian Tribe that seeks to administer a program under this part shall submit to the Administrator a letter of submittal from the Governor or his or her designee or from the governing body of an Indian Tribe requesting EPA approval of the program and at least three copies of a program submission. The submission shall contain the following:

* * * * *

(3) A legal opinion from the Attorney General for the State, the Tribal attorney, or the attorney for those State, Tribal, local, or interstate air pollution control agencies that have independent legal counsel, stating that the laws of the State, locality, Indian Tribe, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority. State statutes and regulations cited by the State Attorney General, Tribal attorney, or independent legal counsel shall be in the form of lawfully adopted State or Tribal statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as ''independent legal counsel,'' the attorney signing the statement required by this section shall have full authority to independently represent the State or Tribal agency in court on all matters pertaining to the State or Tribal program. The legal opinion shall also include a demonstration of adequate legal authority to carry out the requirements of this part, including authority to carry out each of the following:

* * * * *

(x) Provide an opportunity for judicial review in State or Tribal court of the final permit action by the applicant, any person who participated in the public participation process provided pursuant to § 70.7 and any other person who could obtain judicial review of such actions under State or Tribal laws.

* * * * *

(xiv) Issue emissions cap permits pursuant to paragraph (b)(12)(i) of this section including advance NSR conditions consistent with all applicable requirements.

* * * * *

(6) A showing of adequate authority and procedures to determine within 60 days of receipt whether applications (including renewal applications) are complete, to request such other information as needed to process the application, and to take final action on complete applications within 18 months of the date of their submittal, except for initial permit applications, for which the permitting authority may take up to 3 years, or up to 5 years for Tribal programs, from the effective date of the program to take final action on the application, as provided for in the transition plan.

* * * * *

(11) * * *

(ii) Final action shall be taken on at least one-third of such applications annually over a period not to exceed 3 years after such effective date, except for Tribal programs for which the transition period will be for a period agreed upon jointly by the Tribe and the appropriate EPA Regional Office not to exceed 5 years;

* * * * *

(12) * * *

(i) *Trading under permitted emissions caps.* The program shall require the permitting authority to include in a permit an emissions cap, pursuant to a request submitted by the applicant, consistent with any specific emissions limits or restrictions otherwise required in the permit by any applicable requirements, and permit terms and conditions for emissions trading solely for the purposes of complying with that cap, provided that the permitting authority finds that the request contains adequate terms and conditions, including all terms required under §§ 70.6(a) and (c) of this part, to determine compliance with the cap and with any emissions trading provisions. The permit shall also contain terms and conditions to assure compliance with all applicable requirements. The permit applicant shall include in its application proposed replicable procedures and permit terms that ensure the emissions cap is enforceable and trades pursuant to it are quantifiable and enforceable. Any permit terms and conditions establishing such a cap or allowing such trading may be established only in procedures for permit issuance, renewal, or permit revision pursuant to § 70.7(e)(2)(vi). The permitting authority shall not be required to include in the cap or emissions trading provisions any emissions units where the permitting authority determines that the emissions are not quantifiable or where it determines that there are no replicable procedures or practical means to enforce the emissions trades.

(A) Under this paragraph (b)(12)(i) of this section, the written notification required by paragraph (b)(12) of this section shall state when the change will occur and shall describe how increases and decreases in emissions will comply with the terms and conditions of the permit. The written notification requirement for the first and all subsequent changes may be met by submitting a single notice at least 7 days in advance of the first change allowed by the terms of the emissions cap permit.

(B) The permit shield described in § 70.6(f) of this part may extend to terms and conditions that allow such increases and decreases in emissions.

* * * * *

(d) *Interim approval.* (1) If a program (including a partial permit program but not including Tribal programs) submitted under this part substantially meets the requirements of this part, but is not fully approvable, the Administrator may by rule grant the program interim approval.

* * * * *

(3) * * *

(iv) *Public participation.* The program must provide for adequate public notice of and an opportunity for public participation on draft permits, reopenings for cause, and revisions as required by § 70.7 of this part, except for:

(A) Modifications qualifying for minor permit modification procedures under § 70.7(e) of this part as promulgated July 21, 1992; and

(B) Permit revisions to incorporate changes subject to minor NSR processed under § 70.7(e)(2) of this part as promulgated [date of final rulemaking].

(e) *EPA review of permit program submittals.* Within 1 year after receiving a program submittal, the Administrator shall approve or disapprove the program, in whole or in part, by publishing a notice in the **Federal Register**, except that no Tribal program

will be disapproved. Prior to such notice, the Administrator shall provide an opportunity for public comment on such approval or disapproval. Any EPA action disapproving a program, in whole or in part, shall include a statement of the revisions or modifications necessary to obtain full approval. The Administrator shall approve State programs and programs to be administered by eligible Indian Tribes that conform to the requirements of this part.

(1) Within 60 days of receipt by EPA of a State program submission, EPA will notify the State or Indian Tribe whether its submission is complete enough to warrant review by EPA for either full, partial, or interim approval, except that no Tribal program will be considered for interim approval. If EPA finds that a State's or Indian Tribe's submission is complete, the 1-year review period (i.e., the period of time allotted for formal EPA review of a proposed State or Tribal program) shall be deemed to have begun on the date of receipt of the State's or Indian Tribe's submission. If EPA finds that a State's or Indian Tribe's submission is incomplete, the 1-year review period shall not begin until all the necessary information is received by EPA.

(2) If the State's or Indian Tribe's submission is materially changed during the 1-year review period, the Administrator may extend the review period for no more than 1 year following receipt of the revised submission.

* * * * *

3. Section 70.5 is amended by adding the following language to the end of paragraph (d) to read as follows:

§ 70.5 Permit applications.

* * * * *

(d) * * * The responsible official shall certify, by his or her signature, the following statement: ''I certify under penalty of law that I above personally examined, and am familiar with, the statements and information submitted in this document and all of its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statement and information, including the possibility of fine or imprisonment.''

4. Section 70.6 is amended by adding a new paragraph (a)(1)(iv); by adding the words ''Except for Tribal programs'' to the beginning of the first sentence in paragraphs (a)(8), (a)(9), and (a)(10); and by revising paragraph (g)(2) to read as follows:

§ 70.6 Permit content.

(a) * * *

(1) * * *

(iv) With respect to applicable requirements under section 112(r)(7) of the Act, the inclusion of permit conditions in accordance with regulations promulgated under section 112(r) shall satisfy the requirements of paragraph (a)(1) of this section.

* * * * *

(g) * * *

(2) A State may provide for an affirmative defense available in an action brought for noncompliance with technology-based emissions limitations established only in the part 70 permit. Such an affirmative defense may be available only if the conditions of paragraph (g)(3) of this section are met.

* * * * *

5. Section 70.7 is amended by redesignating paragraphs (f), (g), and (h) as paragraphs (i), (j), and (k) respectively; revising paragraphs (d) and (e); and adding new paragraphs (f), (g), and (h) to read as follows:

§ 70.7 Permit issuance, renewal, reopenings, and revisions.

* * * * *

(d) *General Requirements for Permit Revisions.*

(1) *Changes requiring permit revision.* Changes at a source requiring a revision of a part 70 permit are those that:

(i) Could not be operated without violating an existing permit term; or

(ii) Render the source subject to an applicable requirement to which the source has not been previously subject.

(2) *Program provisions.* The program shall provide for adequate, streamlined, and reasonable procedures for expeditiously processing permit revisions. The State or Indian Tribe may meet this obligation by adopting the procedures set forth in paragraphs (e) and (f) of this section or ones that are approved by EPA as substantially equivalent.

(3) *Exemption for acid rain.* A permit revision for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

(4) *Public notice and access.* For all part 70 permit revisions for which an opportunity for public comment is not provided prior to the change, the program shall provide in a general manner for periodic notification to the public on at least a quarterly basis and for public access to the records regarding such revisions.

(e) *Permit revisions for changes subject to a State review program.* (1) *Applicability.* The following changes shall be incorporated into part 70 permits using the permit revision procedures set forth in paragraph (e)(2) of this section as changes with prior review.

(i) *More environmentally significant changes subject to a State review program.* The more environmentally significant changes subject to a State review program shall be defined in the program and shall include at a minimum the following:

(A) Any change subject to major NSR;

(B) Any physical change or change in the method of operation of a part 70 source associated with a project where the prospective emissions increases from such changes, considered by themselves, would be a significant emissions increase of any pollutant subject to regulation under part C or D of the Act;

(C) Any change subject to prior public and EPA review under regulations implementing section 112(g) of the Act; and

(D) Any other category of changes subject to prior public and EPA review the permitting authority determines in its program to have a similarly significant environmental impact.

(ii) *Less environmentally significant changes subject to a State review program.* Less environmentally significant changes in this category include all changes subject to the State's minor NSR program (established pursuant to 40 CFR 51.160), except for those changes described in paragraph (e)(1)(i)(B) of this section, all source-specific SIP revisions, and any other changes approved by EPA in the program as such.

(2) *Procedures.* The program shall provide that for each change subject to a State review program:

(i) In the context of the State review program, an adequate opportunity is afforded for review by the public, EPA, and affected States of any revisions to the part 70 permit.

(ii) Except as provided in paragraph (e)(2)(viii) of this section, a document or combination of documents is issued by the permitting authority that describes any new or different applicable requirement(s) to which the change is subject and any resulting changes or additions to existing part 70 permit terms necessary to meet the permit content requirements of §§ 70.6(a) and (c) of this part.

(iii) The permitting authority shall revise the part 70 permit upon issuance of any document described in paragraph (e)(2)(ii) of this section or receipt of any

notice described in paragraph (e)(2)(viii) of this section by immediately attaching the document to the part 70 permit. Such document may be any preconstruction permit under minor or major NSR, any source specific SIP revision, or any action subject to prior public and EPA review taken under regulations implementing section 112 (g) of the Act.

(iv) The provisions of paragraph (e)(2)(iii) of this section do not apply with respect to a unitary permit program provided the unitary permit has already incorporated all new or different applicable requirements and contains sufficient terms or conditions to meet the permit content requirements of §§ 70.6(a) and (c) of this part. For purposes of this part, a unitary permit means a single permit which contains all terms and conditions needed to meet the requirements of part 70 and the requirements of major or minor NSR or regulations implementing section 112(g) of the Act.

(v) Except as provided by paragraph (e)(2)(viii) of this section, the source may not operate a change until the permitting authority has revised the part 70 permit or issued a unitary permit, as applicable.

(vi) For the more environmentally significant changes subject to a State review program, the program shall ensure that:

(A) The public, EPA, and affected States receive notice of, and opportunity to comment on, the part 70 permit revision consistent with the provisions setting forth prior review to which the change is subject; and

(B) The opportunity for comment extends to the draft part 70 permit terms as needed to revise existing part 70 permit terms and to meet the permit content requirements of §§ 70.6(a) and (c) of this part.

(vii) For less environmentally significant changes described under paragraph (e)(1)(ii) of this section, and for the purpose of determining adequate opportunity for review for the purpose of paragraph (e)(2)(i) of this section with respect to such changes, the program may vary the procedures for, and timing of, public, EPA, and affected State review in light of the environmental significance of the change. The permitting authority may designate in its program certain categories of changes, subject to EPA approval, as de minimis changes. The permitting authority may postpone until renewal of the affected part 70 permit review by the public, EPA, and affected States for such de minimis changes.

(viii) For those changes which a State review program allows a source to make in accordance with specified requirements without obtaining prior permitting authority review and approval, the source shall submit to the permitting authority upon operating the change a notice describing the change and setting forth the applicable requirement(s) to which the change is subject and the part 70 permit terms required by §§ 70.6 (a) and (c) of this part. The notice shall also state that the source upon making the change will meet all applicable requirements and that the relevant requirements of part 70 have been met. Upon submitting the notice, the source shall attach a copy of it to its part 70 permit. This action shall revise the permit to the extent that operation of the change does not conflict with any existing permit term. Where a conflict exists, the source may not revise its permit pursuant to this provision and may not operate the change until its permit is revised.

(3) *Program provisions.* The program may provide for changes that are reviewed under a State review program to be processed under the procedures in paragraph (e)(2) of this section pursuant to regulations implementing either title V or title I of the Act provided that any procedures under title V are concurrent with any procedures under title I.

(f) *Permit revisions for changes not subject to a State review program.* (1) *Applicability.* Changes not otherwise reviewed by a State shall be incorporated into part 70 permits using the permit revision procedures set forth in paragraph (f)(2) of this section.

(i) *More environmentally significant changes not subject to a State review program.* The more environmentally significant changes in this category shall be defined in the program and shall include at a minimum the establishment or revision of the following if they are not otherwise reviewed by the State.

(A) MACT determinations made under regulations implementing section 112(j) of the Act;

(B) Alternative emission limits established under regulations implementing section 112(i)(5) of the Act;

(C) Alternative requirements established under § 70.6(a)(1)(iii) of this part or under substitute section 112 standards established pursuant to a program approved by EPA for such purpose under section 112(l) of the Act;

(D) (Establishment only) restrictions on the potential to emit of an entire source including those for the purpose of establishing minor source status under title I of the Act; and

(E) Changes involving new or alternative monitoring methods that have not been authorized as adequate for measuring compliance under major or minor NSR, under regulations implementing section 112(g) of the Act, or under any other equivalent procedures.

(ii) *Less environmentally significant changes not subject to a State review program.* Less environmentally significant changes in this category are those approved by EPA in the program as such and include as a minimum the establishment or revision of the following if they are not subject to a State review program.

(A) Alternative operating scenarios;

(B) Monitoring terms not made or addressed in association with the processing of changes pursuant to paragraph (e) of this section; and

(C) (Revision only) restrictions on the potential to emit of an entire source including those for the purpose of establishing minor source status under title I of the Act; and

(D) Emissions averaging restrictions to meet a standard set under section 112(d) of the Act.

(2) *Procedures.* For changes described in paragraph (f)(1) of this section, the program shall provide that for each change not subject to a State review program:

(i) An adequate opportunity occurs for review by the public, EPA, and affected States to address the change and any associated revisions to the source's part 70 permit.

(ii) The terms of the permit revision will be sufficient to assure compliance with all applicable requirements and the permit content requirements of §§ 70.6 (a) and (c) of this part.

(iii) Unless specified otherwise in this paragraph, the source may not operate the change until the permitting authority has revised the part 70 permit.

(iv) The more environmentally significant changes described in paragraph (f)(1)(i) of this section shall be reviewed pursuant to procedural requirements applicable to initial permit issuance in paragraph (a)(1) of this section, except that the permitting authority shall complete review of the majority of these changes within 6 months after receipt of a complete application.

(v) For other changes described in paragraph (f)(1)(ii) of this section, and for the purpose of determining adequate opportunity for review for the purpose of paragraph (f)(2)(i) of this section with respect to such changes, the program may vary the procedures for, and the timing of, public, EPA, and affected State review in light of the environmental significance of the change.

(A) The permitting authority may postpone until renewal of the affected part 70 permit review by the public, EPA, and affected States for changes that are approved by EPA in its part 70 program as being de minimis. The following changes may be incorporated into permits using the procedures in paragraph (f)(2)(v)(B) of this section:

(*1*) Correcting typographical errors;

(*2*) Making minor administrative changes, such as a change in the name, address, or phone number of any person identified in the permit;

(*3*) Requiring more frequent monitoring, recordkeeping, or reporting by the permittee;

(*4*) Allowing for a change in ownership or operational control of a source where the permitting authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permitting responsibility, coverage, and liability between the current and new permittee has been submitted to the permitting authority;

(*5*) Incorporating a compliance schedule from an applicable requirement with a future compliance date promulgated after permit issuance; or

(*6*) Incorporating any other type of change which the State determines, and the Administrator approves, as de minimis.

(B) For changes described in paragraph (f)(2)(v)(A) of this section, the permittee or the permitting authority may initiate the administrative incorporation into the permit by issuing a notice describing what information in the part 70 permit is affected by such a change and sending the notice to the permitting authority or the permittee as appropriate.

(*1*) Where the source issues a notice, the permit shall be revised upon mailing of the notice by the source to the permitting authority by certified mail.

(*2*) Where the permitting authority issues a notice, the permit shall be revised upon its attachment to the permit.

(*3*) The program may provide that changes described in paragraph (f)(2)(v)(A) of this section may be implemented prior to issuance of the notice or revision of the part 70 permit.

(C) For changes which trigger a new or different applicable requirement but which a source can make without obtaining permitting authority approval, the program shall provide that:

(*1*) The source shall submit to the permitting authority upon operating the change a notice that:

(*A*) Describes the change;

(*B*) Sets forth the applicable requirement(s) to which the change is subject;

(*C*) Sets forth the part 70 permit terms necessary to meet the permit content requirements of §§ 70.6 (a) and (c) of this part; and

(*D*) States that the source upon making the change will meet all applicable requirements and that the relevant requirements of part 70 have been met;

(*2*) The source's mailing of the notice by certified mail to the permitting authority shall revise the permit, provided that operation of the change does not conflict with any existing permit term. Where a conflict exists, the permitting authority shall not revise the permit pursuant to this provision and the source shall not operate the change until its permit is revised pursuant to applicable procedures in paragraph (f) of this section.

(3) *Combination changes.* Notwithstanding the provisions of paragraph (f)(2) of this section, changes described in paragraph (f)(1) of this section may be combined with changes described in paragraph (e)(1) of this section and processed using the procedures of paragraph (e)(2) of this section, provided the procedures to which the changes under paragraph (f)(1) of this section would have been subject under paragraph (f)(2) of this section are provided in procedures pursuant to paragraph (e)(2) of this section.

(g) *Permit shield.* The permit shield under § 70.6(f) of this part may be granted by the permitting authority prior to permit renewal only for:

(1) Any change defined pursuant to paragraph (e)(1)(i) or (f)(1)(i) of this section;

(2) Any change to which the Administrator has objected as a result of a petition filed under § 70.8(d) of this part, except that the permit shield may be granted only to permit terms that are revised or added as a result of EPA's objection; and

(3) Any change defined pursuant to paragraph (e)(1)(ii) or (f)(1)(ii) of this section for which public and EPA review has occurred.

6. Section 70.8 is amended by revising the title; by revising paragraphs (a)(1), (b), (c)(1), (c)(2), (c)(3)(iii), and (d); by adding introductory text to paragraph (c); by adding new paragraphs (c)(5) and (c)(6); and by revising the first sentence in paragraph (e) to read as follows:

§ 70.8 Permit review by EPA, affected States, and Indian Tribes.

(a) *Transmission of information to the Administrator.*

(1)(i) For permits and permit renewals, the part 70 program shall require that the permitting authority provide to the Administrator a copy of each permit application, each proposed permit, and each final part 70 permit.

(ii) For permit revisions for changes that are subject to a State review program and that meet the definition of more environmentally significant changes under § 70.7(e)(1)(i) of this part, the part 70 program shall require that the permitting authority provide to the Administrator a copy of each application submitted for purposes of the State review program and each proposed and final action under the State review program (including revisions to the part 70 permit).

(iii) For permit revisions for changes that are not subject to a State review program and that meet the definition of more environmentally significant under § 70.7(f)(1)(i) of this part, the part 70 program shall require that the permitting authority provide to the Administrator a copy of each permit revision application, and each proposed and final permit revision.

(iv) For permit revisions that are defined as de minimis under the part 70 program and approved by EPA under § 70.7 of this part, no permit applications or permit revisions are required to be submitted to the Administrator.

(v) For all permit revisions other than those referred to in paragraphs (a)(1) (ii) through (iv) of this section, the part 70 program shall require that the permitting authority provide to the Administrator a copy of each relevant permit application or summary thereof, and a copy of each final part 70 permit revision.

(vi) For any permit or permit revision, upon agreement with the Administrator, the permitting authority may submit to the Administrator an application summary form and any relevant portion of the application and compliance plan, in place of the complete application and compliance plan. To the extent practicable, information submitted to the Administrator shall be provided in computer readable format compatible with EPA's national database management system.

* * * * *

(b) *Review by affected States.*

Eligible Indian Tribes may be considered affected States under this paragraph. Indian Tribes are not required to submit a part 70 program for the limited purpose of being considered an affected State under this paragraph.

(1) For purposes of paragraph (b) of this section, an Indian Tribe will be

considered an affected State if it administers a tribal program and otherwise meets the definition of ''affected State'' set forth in § 70.2 of this part.

(2) The permit program shall provide that the permitting authority give notice of each draft permit or draft permit revision (including any proposed action pursuant to a prior State review program, as relevant) to any affected State on or before the time that the permitting authority provides this notice to the public under § 70.7 of this part. Where § 70.7 does not require prior public notice of a permit revision, the permitting authority shall give notice of the final permit revision on or before the time that the permitting authority provides this notice to the public under § 70.7.

(3) The permit program shall provide that the permitting authority, as part of the submittal of any proposed permit or proposed permit revision to the Administrator, shall notify the Administrator and any affected State in writing of any refusal by the permitting authority to accept all recommendations for the proposed permit that the affected State submitted during the public and affected State review period. The notice shall include the permitting authority's reasons for not accepting any such recommendation. The permitting authority is not required to accept recommendations that are not based on applicable requirements or the requirements of this part.

(c) *EPA objection.* For purposes of State programs approved under part 70 as promulgated on July 21, 1992, paragraph (c) of this section as promulgated on July 21, 1992 shall apply. For purposes of State programs approved under part 70 as revised on [date of final rulemaking], paragraph (c) of this section as promulgated on [date of final rulemaking] shall apply.

(1) Except as provided by paragraphs (c)(5) and (6) of this section, the Administrator will object to the issuance of any proposed permit or any permit revision determined by the Administrator not to be in compliance with applicable requirements or requirements under this part. No permit or permit revision for which an application must be transmitted to the Administrator under paragraph (a) of this section shall be issued if the Administrator objects to its issuance in writing during the 45-day period following:

(i) In the case of initial permit issuance, permit renewals, and permit revisions for changes as defined under § 70.7(f)(1)(i) of this part, receipt of the proposed permit or proposed permit revision and all necessary supporting information; or

(ii) In the case of permit revisions for changes as defined under § 70.7(e)(1)(i) of this part, the beginning of the public comment period for such revisions (although the Administrator may object within 45 days of receipt of the final permit revision for defects that were not reasonably apparent in the draft permit submitted for public review).

(2) Any EPA objection under this section shall include a statement of the Administrator's reasons for objection and a description of the terms and conditions that the permit must include to respond to the objections. The Administrator will provide the permittee a copy of the objection.

(3) * * *

(iii) Process the permit or permit revision under the procedures approved to meet § 70.7 of this part.

* * * * *

(5) For 5 years following approval of the part 70 program implementing this paragraph, the Administrator shall not object to a permit revision for a change as defined under §§ 70.7 (e)(1)(ii) or (f)(1)(ii) of this part except where it is in response to a petition filed pursuant to paragraph (d) of this section, and the permit revision contains an error that would, either alone or in combination with other similar permit revisions likely to be issued, likely have a significant adverse environmental effect. A permit revision would be deemed to have a significant adverse environmental impact if it were employed as a device to limit potential to emit below major source or major modification thresholds (as set forth in title I of the Act) but in the Administrator's judgment would allow increases above those thresholds.

(6) The Administrator shall not object to any permit revision for a change approved by EPA in a part 70 program as de minimis.

(d) *Public petitions to the Administrator.* (1) The program shall provide that, if the Administrator does not object in writing by the expiration of the applicable 45-day review period specified in paragraph (c) of this section, any person may petition the Administrator to make such objection within 60 days after the expiration of the applicable review period, or, for all permit revisions for changes as defined under §§ 70.7(e)(1)(ii) or (f)(1)(ii) of this part (other than for de minimis changes as defined by the part 70 program and approved by EPA under § 70.7 of this part), within 60 days of the date the public is notified of the revision of the part 70 permit. The program shall also provide that the public have access to information concerning the beginning and expiration of EPA's 45-day review period as required for permit issuance, revisions, reopenings, and renewals pursuant to § 70.7 of this part.

(2) Any petition shall be based only on objections to the permit that were raised with reasonable specificity during any public comment period provided for in § 70.7 of this part, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, no public comment period was provided, or the grounds for such objection arose after such period.

(3) If the Administrator objects to the permit as a result of a petition filed under this paragraph, the permitting authority shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period specified in paragraph (c) of this section and prior to an EPA objection.

(4) If the permitting authority has issued a permit pursuant to the procedures in §§ 70.7(e)(1)(ii) or (f)(1)(ii) of this part prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in §§ 70.7(e)(2) or (f)(2) of this part as appropriate except in unusual circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.

(e) *Prohibition on default issuance.* Consistent with § 70.4(b)(3)(ix) of this part, for the purposes of Federal law and title V of the Act, no State program may provide that a part 70 permit or a part 70 permit revision for a change as defined under §§ 70.7(e)(1)(i) or 70.7(f)(1)(i) will issue until affected States and EPA have had an opportunity to review the permit or permit revision as required under this section. * * *

8. Section 70.10 is amended by adding a new paragraph (a)(3) and by revising paragraphs (b)(1) and (c)(1) to read as follows:

§ 70.10 Federal oversight and sanctions.

(a) * * *

(3) The requirements of paragraphs (a)(1) and (a)(2) of this section shall not apply to Indian Tribes and Tribal programs.

(b) * * *

(1) Whenever the Administrator makes a determination that a permitting

authority is not adequately administering or enforcing a part 70 program, including a Tribal program, or any portion thereof, the Administrator will notify the permitting authority of the determination and the reasons therefore. The Administrator will publish such notice in the **Federal Register**.

* * * * *

(c) *Criteria for withdrawal of State or Tribal programs.* (1) The Administrator may withdraw program approval in whole or in part whenever the approved program no longer complies with the requirements of this part and the permitting authority fails to take corrective action. Such circumstances, in whole or in part, include any of the following:

* * * * *

9. Section 70.11 is amended by revising the introductory text to read as follows:

§ 70.11 Requirements for enforcement authority.

Except for Tribal programs, with respect to criminal enforcement matters only, under which the Tribe shall enter into a formal Memorandum of Agreement with EPA to provide for the timely referral of criminal enforcement matters to the appropriate EPA Regional Administrator, all programs to be approved under this part must contain the following provisions:

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